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No.

IN THE

Supreme Court of the United States

ABDUL AZIMI, PETITIONER

v.

JORDAN'S MEATS, INC.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Did the Trial Court Err in Failing to Follow U.S. Supreme Court Precedent, and thereby in Granting Summary Judgment on Petitioner's Wrongful Discharge Claims, Where There Were Material Issues of Fact in Dispute and Where Competent and Admissible Evidence Confirmed that the Discharge was Premised on Unconstitutional Discrimination?

B. Do the Interests of Comity Require this Court to Resolve the Disparity between the First Circuit Court of Appeals and those of the Other Circuits as to the Clear Mandate of 42 U.S.C. § 1981a(b), Permitting the Award of Punitive Damages in the Absence of Other Damages?

C. Should the Jury Have Been Instructed to Consider Punitive Damages, Where the Jury Found that the Respondent Intentionally Violated Petitioner's Constitutional Rights?

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The published opinion of the United States Court of Appeals for the First Circuit in *Abdul Azimi v. Jordan's Meats, Inc.* (C.A. No. 05-2602), decided August 3, 2006, and reported at ___ F. 2d ___(1st Cir.2006), denying the appeal of Petitioner Abdul Azimi and affirming the District Court (App. at 1a-42a) and the subsequent Order of the United States Court of Appeals for the First Circuit in *Abdul Azimi v. Jordan's Meats, Inc.* (C.A. No. 05-2602), decided August 29, 2006 denying the Petitioner's petition for rehearing and rehearing *en banc*, is set forth in the Appendix hereto (App. at 1a-42a).

The unpublished Order of the United States District Court for the District of Maine *Abdul Azimi v. Jordan's Meats, Inc.*, (Civil Action No. 03-268-P-C), decided September 20, 2005, denying the Petitioner's Motion for Reconsideration and for Retrial (App. at 51a) and the earlier Order of the United States District Court for the District of Maine *Abdul Azimi v. Jordan's Meats, Inc.*, (Civil Action No. 03-268-P-C), decided July 13, 2005, denying the Petitioner's Motion for Retrial (App. at 43a-48a).

The unpublished Memorandum Opinion and Order of the United States District Court for the District of Maine *Abdul Azimi v. Jordan's Meats, Inc.* (Civil Action No. 03-268-P-C), decided November 23, 2004, granting the Respondent's Motion for Summary Judgment on Petitioner's claims of wrongful discharge, is set forth in the Appendix hereto (App. at 49a-50a).

JURISDICTION

A. Basis for this Court's Jurisdiction

This case involves claims of a racially, ethnically and religiously oppressive and hostile work environment, in violation of 42 U.S.C. § 2000e-2 (part of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., hereinafter referred to as "Title VII"), and 42 U.S.C. §1981. The Plaintiff-Petitioner Abdul Azimi (hereinafter "Mr. Azimi"), also alleged claims of unlawful discharge under 42 U.S.C. § 2000e and 42 U.S.C. §1981.

As these claims raise federal questions and claims of civil rights violations, the District Court of the State of Maine had original subject matter jurisdiction, pursuant to 28 U.S.C. § 1331 and §1343.

The District Court improperly granted Respondent-Jordon Meats, Inc. (hereinafter "Respondent") Motion for Summary judgment as to Mr. Azimi's wrongful discharge claims, where there were factual issues in dispute as to whether the discharge explanation was simply a pretext for discriminatory animus. That order was entered on November 23, 2004. (App. at 49a-50a).

Following a week-long trial, the jury returned a verdict, finding that Mr. Azimi had been subjected to an oppressive and hostile work environment that Jordan's Meats knew of or should have known of and yet failed to take adequate and effective means to remediate. Inexplicably, the jury awarded no compensation to Mr. Azimi, who had been forced to work in this oppressive and humiliating environment for more than two years. The

Court refused to allow the jury to consider punitive damages, having not awarded compensatory damages.

On April 29, 2005, the District Court judge entered Judgment in favor of Mr. Azimi with respect to his hostile work environment claims. Without explanation, reason, notice or hearing, the same judge reversed himself later the same day, entering an Amended Judgment in favor of Jordan's Meats, Inc. on all counts!

While the Court finally entered Declaratory Judgment in Mr. Azimi's favor on the hostile work environment claims, as required by the jury findings (App. at 59a-60a), it denied Petitioner's post-trial motions seeking a retrial on the issue of damages. In addressing the merits of the applicability of punitive damages, the court refused to allow jury consideration of punitive damages, where the jury had not returned an award of compensatory damages. See District Court's denial of Mr. Azimi's Motion for a New Trial and request for nominal damages, July 13, 2005 (App. at 43a-48a) and Motion for Reconsideration of Order Denying Plaintiff's Motion for a New Trial, September 20, 2005. (App. at 51a).

Mr. Azimi appealed to the First Circuit Court of Appeals, pursuant to 28 U.S.C. § 1291, seeking to have these lower court rulings set aside.

This appeal was denied and judgment was affirmed in an opinion dated August 3, 2006. (App. at 1a-42a). A timely Petition for Rehearing en Blanc was denied on August 29, 2006. (App. at 61a).

The Petitioner asserts that the District Court erred in its rulings and that the First Circuit Court of Appeals erred in refusing to set aside the lower Court's entry of

Summary Judgment and rulings on Motions for retrial on Damages. This Court has jurisdiction to consider the United States Court of Appeals for the First Circuit decision denying the Petitioner's appeal and affirming the District Court's orders, pursuant to 28 U.S.C. 2101and 1254(1).

This Petition for Writ of Certiorari is filed within ninety (90) days of the date of the Court of Appeals' denial of the Petitioner's timely filed Petition for Rehearing and Rehearing *en banc*. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3.

RELEVANT PROVISIONS INVOLVED

See appendix

STATEMENT

The facts in this case could not possibly present a more egregious case of racial, ethnic and religious civil rights violations in the workplace.

In November of 1999, Mr. Azimi, an Afghanistan immigrant, was hired by the Respondent. Not long thereafter, Mr. Azimi began being subjected to hostile and oppressive ridicule and depravity by co-workers and line leaders. The deprecating and outrageous conduct and comments of these co-workers were racially, ethnically and religiously motivated—directed against him because of his race, Muslim faith and Afghanistan origin.

He was subjected to an unconstitutionally violative and hostile work environment, at the hands of his co-workers and line leaders and without employer interference. The language and content of the comments were not only racially motivated, but they

were also designed as an affront to basic tenets of Mr. Azimi's Muslim faith. The evidence presented at trial, which has been recognized as accurate by both the District Court[1] and the First Circuit, included the following;

- Within the same month that he started at the plant, a co-worker swore and yelled at Mr. Azimi, "You fucking piece of shit".

- December, 1999, Mr. Azimi found a threatening letter in his locker, which read, "fucking 'Musselum' you piece of shit, we hate you, fucking nigger".

- When Mr. Azimi brought rice to the company Christmas party he was told, "we don't need your rice, man, we don't want you to eat with us". A co-worker yelled and threatened, "open your fucking eyes" and "I'll break your fucking teeth". Mr. Azimi testified that this encounter was overseen by a manager and that it left him in tears.
- A line leader quoted the "American way" as he refused to help Mr. Azimi in moving 900 lb. meat racks, pushed and splashed meat products and blood at him.

- The hot water that Mr. Azimi used to clean and thaw his cold hands was shut off on three separate occasions. White employees were allowed to use the hot water.

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[1] The Magistrate adopted these facts for purposes of Jordan's Meats Motion for Summary Judgment. See Magistrate's Recommended Decision on Defendant's Motion for Summary Judgment, at page 2-9 of the App. at .

- Mr. Azimi was punched and told to "go fuck himself". A co-worker taunted Mr. Azimi with pork product and with a comment about oral sex (both of which are considered to be repugnant in the Muslin faith).

- Co-worker forced pork into Mr. Azimi's mouth and spouted, "fuck you and fuck your God; fuck your religion".

- Co-worker made comment that if "he went down on her [Mr. Azimi's fiancé], she will never go with you [Mr. Azimi] again". (Oral sex is considered to be repugnant on the Muslin faith).

- Told by a co-worker to "suck my dick" and was forcibly lifted off the ground. Other co-workers watched and laughed.

- Grabbed from behind and pulled toward a co-worker, "humping" Mr. Azimi. He testified that this happened to him on at least three separate occasions.

- In December 2000, a co-worker yelled, "fuck your god and fuck your Christmas".
- Co-worker intentionally pushed over a large stack of pallets, leaving them for Mr. Azimi's to clean up.

- Mr. Azimi was repeatedly subjected to comments about "pork and pussy", co-workers and management knowing that it was repugnant to his faith.

- Received phone call and told by co-worker, "Nigger, Saddam Hussein is waiting for you".

- The next day, the same co-worker threatened, "you know little boy, I have been here 13, 14 years, do you think they will believe you over me? I'll rip your ass off".

- Co–workers took Mr. Azimi's goggles, which were later found smashed along with his hearing protection equipment.

- Pieces of ham and pork were found in his coat pockets at work.

- Co-workers placed a lock on Mr. Azimi's locker, keeping him from getting into his own locker.

- Mr. Azimi's shoes were found in the toilet.

- Note found in Mr. Azimi's locker, "Daddy wants you", a few weeks after September 11, 2001 attack on the World Trade Center, on a sticker with Osama Bin Laden's picture on it.

This evidence leaves no doubt as to the outrageous nature of the conduct and language that Mr. Azimi was subjected to. At trial, he consistently testified that he went to management personnel to apprise them of each episode of this unrelenting harassment. Yet, no action was taken to effectively curtail the harassment of Mr. Azimi, the company's only Muslim employee. See Jury Special Verdict Form of April 25, 2005 (App. at p52a-54a). Instead of disciplining his persecutors, Azimi himself was moved from line to line and shift to shift.

In short, the facts in this case demonstrate a two year history of an individual being persistently denied basic human and civil rights, simply because of his race, national origin and Muslim faith. Nothing could be more repugnant to the laws and Constitution of this country. Nothing that is, except allowing it to take place with impunity and without legal recourse.

REASONS FOR GRANTING THE PETITION

A. The District Court's Granting of Respondent's Motion for Summary Judgment as to an Afghan Muslim's Post 9/11 Discharge was in Error in Violation of the Standard Established by this Court in *Reeves v. Sanderson* Where Issues of Fact in Dispute Were For a Jury to Decide.

1. Standard for Summary Judgment

Summary Judgment may only be granted where the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". F.R.Civ.P. 56(c). A party moving for summary judgment must demonstrate that viewing the record in the light most favorable to the non-moving party, there is no evidence to support the non-moving party's case. *Celotex Corp. vs. Catrette*, 477 US 317, 325 (1986). The non-moving party need only demonstrate that a trier of fact could reasonably find in his or her favor. *Hodgens vs. General Dynamics Corporation*, 144 F.3d 151, 158 (1st Cir. 1998).

In a discrimination case, *Reeves v. Sanderson*, 530 U.S. 133 148 (2000) makes clear that a plaintiff's *prima facia* case, combined with sufficient evidence to find the

employer's asserted justification is false, is sufficient to withstand summary judgment without additional, independent evidence of discrimination. This analysis rejects the First Circuit's "pretext-plus" requirement that a Plaintiff show both that the employer's explanation is false or a pretext and that it was motivated by discrimination. Expressly abrogating *Woods v. Friction Materials, Inc*, 30 F.3d 255 (C.A.1 1994).

Recognizing that a jury can infer discriminatory animus from a *prima facia* showing combined with evidence of disbelievability, the *Reeves* Court refused to require the additional burden of proving discriminatory motivation. *Id.* at 149.

Here, Mr. Azimi demonstrated that there was a genuine issue of material fact as to whether Jordan's Meats, Inc. had shown any legitimate non-discriminatory basis for his dismissal and whether their stated reason was simply a pretext for a discriminatory and/or retaliatory animus.

2. Standard of Appellate Review

The standard for appellate courts review of a District Court's granting of a summary judgment, is *de novo*. *Dubois vs. United States Department of Agriculture*, 102 F.3d 1273, 1283 (1st Cir. 1996). As such, the Court will review the lower court's record "anew" to determine whether or not there is any material issue of fact in dispute that would have foreclosed summary judgment. *Id.*

3. Viewing the Evidence in Favor of Mr. Azimi Under Reeves Compelled Denial of Summary JudgmentThere Were Material Issues of fact in Dispute that Foreclosed Summary Judgment For Jordan's Meats, Inc.

In employment discrimination cases, retaliatory or discriminatory actions against employees can be proven by direct or indirect evidence. Where there is no direct evidence of discriminatory motives, indirect evidence can be used applying the familiar burden shifting analysis of *McDonnell Douglas Corporation vs. Green*, 93 S.Ct. 1817 (1973).

Here, Mr. Azimi presented undisputed evidence of a history of on-going discrimination, disparate treatment and a blatantly hostile work environment, all direct evidence of discriminatory animus, at the root of his discharge.[2]

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[2] Mr. Azimi presented the following evidence, that was adopted as fact by the United States Magistrate:

- Mr. Azimi was repeatedly subjected to offensive conduct and comments throughout his employment, intended to insult and humiliate him based on his race, ethnic origin and religion.
- Following most of the confrontations, Mr. Azimi notified his supervisors. These supervisors and higher management took no disciplinary action against those involved, despite the unrelentless and cruel nature of the persecutions.
- Mr. Azimi, rather than his persecutors, was; 1) sent home without pay following incidents, (2) given reduced hours, and 3) transferred repeatedly from line to line and from area to area within the plant, because of the offensive conduct of others. He was also demoted for complaining that he was not given the same pay as other meat strippers.

Having presented a *prima facia* case of discrimination, the only issues before the Court were; (1) whether Respondent presented cogent evidence of a legitimate explanation for Mr. Azimi's discharge, and; (2) if so, whether Mr. Azimi bore his burden of demonstrating the proffered explanation was a pretext for discriminatory animus. *Reeves*, supra.

- False allegations were made against Mr. Azimi, even before the alleged incident that supposedly resulted in his discharge.
- Mr. Azimi was physically as well as emotionally abused by his co-workers and line leaders.
- Mr. Azimi was subjected to disparate treatment, which included work assignments, working conditions (i.e. no hot water to warm his hands, when working with cold meat) and unexplained changes and reversals in work assignments, to which no white employees were subjected.
- On November 19, 2001, two months after the World Trade Center attack (thought to have been committed by Afghanistan nationals and/or Muslims), within nine months of the filing of his most recent Maine Human Rights Commission Complaint, only weeks after yet another note was left in his locker alleging his affiliation with Osama Bin Laden and days after an incident where he was verbally accosted by a co-worker, Mr. Azimi, rather than his persecutors, was discharged.

See Recommended Decision on Defendant's Motion for Summary Judgment at p. 2-9, App. at p. 344-351, See Also Plaintiff's Opposing Statement of Material Facts and Statement of Material Facts, App. at p. 076-341.

4. Jordan's Meats, Inc. Failed to Meet its Burden of Demonstrating a Credible, Non-discriminatory Reason for Discharging Mr. Azimi

Respondent bore the burden of proving that there was a legitimate, non-discriminatory reason for Mr. Azimi's discharge. It failed to meet its burden.

In *Hodgens v. General Dynamics Corporation*, 144 F.3d 151 (1st Cir. 1998), this Court pointed out that in order for an employer to satisfy its burden of showing a legitimate non-discriminatory reason for discharge, it must present **admissible** evidence that is sufficient to justify judgment in its favor. *Id.* at 161. A mere assertion of a legitimate basis cannot insulate an employer, who uses it as a pretext to mask actual discrimination or retaliation. *Id.* at 167.

Particularly where an employer's intent is a central issue, the factual issues surrounding a discharge must be decided by a jury and not on summary judgment. *Id.* at 168. See Also *Rossy v. Roche Products, Inc.*, 880 F. 2d 621 (1st Cir. 1989)("All of [the employer's] explanations may in fact be accurate, but they must be decided after trial, especially in cases such as this where [the employer's] intent is the central issue). A sentiment echoed in *DeNovellis v. Shalala*, 124 F.3d 298, 306 (1st Cir. 1997), where the court encouraged restraint in granting summary judgment, particularly where discriminatory animus is in issue.

In this case, like *Rossy*, the lower court erred in granting summary judgment, where there were issues of fact in dispute, not only with respect to the believability of Respondent's explanation, but also

the extent to which Mr. Azimi's discharge was actually based on discrimination and retaliation.

Referring to an Affidavit of Brian A. Smith, Respondent claimed that they discharged Mr. Azimi because of hearsay allegations of harassment of a co-worker, Mercedes Manning. (Ironically, the alleged harassment was precisely the kind of misconduct that Mr. Azimi himself had been subjected to for two years and yet not one of the harassing co-workers was ever discharged.)

Despite the requirement that an employer's explanation for adverse action be accompanied by admissible and credible supporting evidence, the Respondent's motion was supported by neither. No admissible or credible evidence was submitted to show that Mr. Azimi harassed Mercedes Manning, as suggested by Mr. Smith's affidavit: Manning speaks Spanish and very little English. Azimi speaks only broken English and no Spanish. As found by the factfinders at the Maine Department of Labor, it thus would not have even been possible to have the detailed conversation Respondent alleges to have taken place. No evidence from Manning, the interpreter nor the people who interviewed her were offered by way of affidavit or testimony as required by F.R.Civ.P.56.

Instead, Respondent relied on the mere assertion of a legitimate explanation by Mr. Smith, the Human Resources Director, who had himself been responsible for addressing Mr. Azimi's complaints and failed to punish those who had harassed Mr. Azimi for years. His mere assertion of legitimate explanation and the inadmissible documents upon

which he claimed to rely[3] provided neither credible nor admissible evidence of Mr. Azimi's wrongdoing.

In fact, the only **admissible** evidence with respect to the incidents was Mr. Azimi's own denial of the allegations and the corroborating report of the Department of Labor Hearing

Officer who found the Respondent's allegations unworthy of belief. In find the Respondent's pretext for discharge false, he wrote:

> To give weight to the employer's argument would require that... [Azimi's] statement to the female witness [Mercedes Manning] was identical to the Claimant's later statement to the supervisor. More important, it would require that the female witness, needing a translator, understood and remembered a statement made in English, and was able to repeat the statement in Spanish to the translator, who then converted the statement in English to the supervisor.
> **The probability of the understanding, memory and translation among two languages and three people producing an identical statement is so remote as to render the employer's argument not credible.**[4]

In short, as the Respondent failed to provide an admissible and/or credible evidence of a legitimate

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[3] The First Circuit erred in stating that the inadmissibility of this evidence was not raised by Mr. Azimi. To the contrary, the Petitioner has consistently argued that this evidence was inadmissible, and that, consequently, the Respondent could not provide a basis for demonstrating a legitimate explanation for discharge.

[4] Plaintiff's SMF ¶45, Exhibit 3 at App. at p. 319-338.

non-discriminatory basis for Mr. Azimi's discharge, it failed to meet its burden of proof under the *McDonnell Douglas* test. *Reeves, Supra* mandates that summary judgment was inappropriate and should be set aside.

5. Mr. Azimi Met His Burden of Proof in Showing the Jordan's Meats, Inc. Explanation Was Nothing More Than a Pretext for Discriminatory and Retaliatory Animus.

While the Respondent failed to meet its burden of showing a legitimate reason for Mr. Azimi's discharge, Mr. Azimi produced ample evidence that the true motivation was discriminatory animus and that the proffered explanation was unworthy of credence.

In *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 120 Sup. Ct. 2097 (2000), this Court reaffirmed the need to provide the employee a fair opportunity to show pretext, as "the question facing triers of fact in discrimination cases is both sensitive and difficult," and there "will seldom be 'eyewitness' testimony as to the employer's mental processes". *Id* at 141 (citing *U.S. Postal Service Bd. of Governors v. Akins*, 460 U.S. 711, 716, 103, 1478, 75 L. Ed. 2d 403 (1983). In this case, Mr. Azimi was denied a "fair opportunity" to present evidence of pretext to a jury.

In light of the difficulty facing employees in showing pretext, the courts have recognized a wide array of evidence that can be used for the purpose. This would include evidence of:

- **By showing "the employer's proffered explanation is unworthy of credence".** [5]

- **By showing "weaknesses, implausibilities, inconsistencies, incoherencies or contradictions", the credibility of the employers stated motives can be called into question.** [6]

- **By showing the factual history of discrimination**

- **By showing the factual history of discrimination and retaliation in the workplace.**[7]

- **By showing a history of disparate treatment, between the discharged employee and others who have done the same or similar offenses, without recourse.**

- **By showing a "temporal proximity" between the complaints about his unfair treatment and adverse employment action.** [8]

- **By the historical background of the decision, sequence of events, departures from the employer's procedures, as well as**

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[5] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)[Emphasis Added].

[6] *Hodgens v. General Dynamics Corporation*, 144 F.3d 151 (1st Cir. 1998)

[7] In *Hodgens*, the court found insufficient evidence of discriminatory motive, as the Plaintiff had had poor performance evaluations and lay offs before he availed himself of the Family Medical Leave Act. This is a very distinguishable fact pattern.

[8] *Supra.*

doubts as to the fairness of the decision in relationship to the stated reason.[9]

Here, Mr. Azimi provided ample evidence that Respondent's explanation for his discharge was simply a pretext for its discriminatory animus against him, his race, his religion and his ethnic background. He provided not only undisputed evidence of a history of discrimination and harassment, but also of his complaints to Mr. Smith and others in management that went largely ignored.

In *Che*, the First Circuit noted that disparity in treatment alone could raise an issue of fact, barring summary judgment. *Id.* at 38-40. Here, the disparity of treatment is striking where Mr. Azimi's persecutors were never disciplined for their vile conduct, while he was fired for unsubstantiated allegations of far less egregious conduct.

Here, the dismissal justification was based almost exclusively on the affidavit of Brian A. Smith, who had no first hand information as to the incident purportedly justifying Mr. Azimi's discharge. *Id.* Mr. Smith **did have**, however, first hand information about the plentitude of episodes of harassment and threats made against Mr. Azimi. *Id.* On several occasions following the terrible incidents of harassment, Mr. Azimi went to Russell Cram and Brian Smith to complain. These were the same two individuals who were directly responsible for his dismissal. Yet none of these other employees who participated in incidents (which bore an uncanny resemblance to the allegations against Mr. Azimi), were fired or even appropriately disciplined. In fact, one of

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[9] *Hodgens* at 168-169.

the worst persecutors, George Libby, was actually promoted. *Id.*

The substantial evidence was that Mr. Azimi was treated in a discriminatory fashion by the Respondent throughout his employment, making his discharge simply the last adverse action in a long history of discriminatory treatment. He, rather than his white persecutors, was sent home after incidents (in which he was the victim), given reduced hours and moved from line to line and area to area within the plant. Plaintiff's SMF ¶ 8-45, App. at p. 078-086. He was asked to do jobs and given sudden changes in assignments, unlike white employees. *Id.* He was consistently sworn at and treated with disrespect, even by supervisors. *Id.*

Critical evidence was imparted to the District Court, as to the temporal proximity between Mr. Azimi's Maine Human Rights Commission complaint and his discharge less than none months later. Again, it was Mr. Smith's job to deal with that complaint. The proximity between Mr. Azimi's complaints about his unfair treatment and ultimate decision to discharge him is strongly probative of the employer's intent, particularly in the context of an ongoing racially hostile work environment. *Che v. Massachusetts Bay Transportation Authority*, 342 F.3d 31, 38 (1st Cir. 2003).

Only 3-4 days before being terminated Mr. Azimi was once again verbally accosted and sworn at by a co-worker, who had not been doing his job. The co-worker stated, "if you don't fucking like it, why don't you go fucking somewhere else". Again, this employee was not fired. Surely, if Respondent was inclined to punish those who threaten, intimidate and/or make false allegations, then the co- workers who tormented him

for two years would have been discharged, but they were not.

Finally, 9-11-01 cannot be overlooked as a significant factor in this case as to the true discriminatory animus. Having already discriminated against Mr. Azimi, as a Muslim from Afghanistan, it would not have been difficult for a jury to conclude that the 9-11-01 attacks may well have precipitated Mr. Azimi's sudden discharge, only weeks thereafter. The importance of this event is further evidenced by the placement of a note on Mr. Azimi's locker only days before his discharge, accusing him of alignment with Asama Bin Laden. See Smith Deposition Exhibit 7, filed with Plaintiff's SMF, App. at p. 257-258. Again, no one was ever punished for that incident.

In short, Mr. Azimi provided ample evidence that the Respondent's proffered explanation was pretextual and that it was actually based on unlawful discrimination. As a result, the District Court committed error by granting Respondent's Motion for Summary Judgment on Mr. Azimi's discriminatory discharge claims and the First Circuit in so affirming, where there were material issues of fact about the motives of the employer. The proffered reasons stated by Respondent for Mr. Azimi's discharge clearly require a credibility assessment, which is the province of the jury alone.

B. It was Error to Not Allow the Jury to Consider Punitive Damages, Having Found that Jordan Meats Intentionally Violated Mr. Azimi's Federal and Constitutional Rights

1. Standard of Appellate Review

The standard of review in considering the district court's determinations of the constitutionality of the imposition of punitive damages is *de novo*. *Provencher v. CVS Pharmacy*, 145 F.3d 5, 10-11 (1st Cir. 1998). See Also *Tisdale v. Federal Express*, 415 F.3d 516, 534 (6th Cir. 2005).

2. Punitive Damages are an Express and Distinct Remedy under 42 U.S.C. §1981a.

The jury on this case concluded that Mr. Azimi was subjected to a hostile work environment and that the Respondent knew or should have known of this abridgment of Mr. Azimi's rights, but failed to undertake remedial measures. In accordance with this verdict, the District Court entered Declaratory Judgment on July 13, 2005 (App. at 59a-60a):

> Therefore, the Court hereby **DECLARES** that the Defendant Jordan's Meats, Inc. has violated 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981." (Emphasis in original Order.)

This Judgment leaves no doubt that Mr. Azimi would have been entitled to recover any remedies applicable under the statutes. Title 42 U.S.C. §1981a specifically sets out an individual's right to recover punitive damages, where there has been a civil rights violation. In pertinent part, the statute provides;

> In an action brought by a complaining party against a respondent who engaged in unlawful intentional discrimination prohibited under 42 U.S.C. 2000e-2 and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in sub-section (b) of this section, from the respondent. *Id.*

Sub-section (b) of 42 U.S.C. § 1981a, entitled "Compensatory and punitive damages", under section (1), "Determination of punitive damages", states also in pertinent part:

> A complaining party may recover punitive damages under this section against a respondent ... if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to federally protected rights of an aggrieved individual.

Nowhere in §1981a under "Right of recovery", is either compensatory or nominal damages made a pre-requisite to the "Right of recovery" of punitive damages.

Moreover, there is no such precondition of compensatory damages provided in § 1981(a). To the contrary, this Court has consistently recognized that Title VII, like 42 U.S.C. §1981 violations are actionable, even without proof of injury. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

The Court having declared that Jordan's Meats violated 42 U.S.C. § 2000e-2 and § 1981, Mr. Azimi is absolutely entitled to have the jury consider punitive damages. As

pointed out by the seventh circuit, "[n]othing in the plain language of §1981a conditions an award of punitive damages on an underlying award of compensatory damages". *Hennessy v. Penril Datacom Networks, Inc.*, 69 F.3d 1344, 1352 (7th Cir. 1995).

In fact, another section of 42 U.S.C. 1981a, provides that any complaining party who seeks "**compensatory or punitive damages** under this section, ... may demand a trial by jury". 42 U.S.C. 1981a (c) [Emphasis Added]. This language further confirms that the statute was intended to afford a complaining party the option to pursue **either** compensatory or punitive damages and that the two are not necessarily inextricably linked.

Under §1981a, a complaining party need only show that employer engaged in a **"discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual"** in order to recover punitive damages. 42 U.S.C. § 1981a(b). See Also *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). The congress placed no additional hurdles on claimants seeking punitive damages, such as requiring compensatory or nominal damages.

This interpretation is also supported by the congressional findings that were made at the time that the Civil Rights Act of 1991 (42. U.S.C. § 1981) was enacted to amend the earlier Civil Rights Act of 1964. Congress expressly found the, "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace". 105 Stat 1071, PL 102-166, 1991 S 1745 [Emphasis Added).

Thus, it was the will and express intention of Congress to prohibit the actions of Respondent against Abdul Azimi and not to permit such egregious violations of law to occur with impunity. Nominal and/or compensatory damages are not a pre-requisite to punitive damage consideration anywhere in the clear language of either 42 USC §1981a (providing relief for Title VII damages) or under 42 USC §1981 (providing relief for racial discrimination). If Congress had intended for there to be a prerequisite of compensatory or nominal damages for the award of punitive damages under 42 U.S.C. § 1981a (b), it would have articulated such a prerequisite. It did not. By law, Abdul Azimi is entitled to punitive damages.

3. Interests of Comity Require that the First Circuit Decision of *Kerr-Selgas v. American Airlines, Inc.* Be Overturned as the Decision Runs Contrary to the Other Circuits.

The jury in this case found a hostile work environment, known to the Respondent and involving a history of racial, religious and ethnic degradation of Mr. Azimi, violative of §1981 and Title VII.

There can be little question that freedom from racial, religious and ethnic discrimination is one of the most fundamental rights we cherish as a nation. Consequently, the abridgment of such fundamental rights mandates a special need for vindication and deterrence. It is in this context that we must examine whether Mr. Azimi should have been allowed to obtain punitive damages, even in the absence of compensatory or nominal damages.

In denying Mr. Azimi the right to present the issues of punitive damages to the jury, the District Court and the First Circuit erroneously relied on the decision in *Kerr-Selgas v. American Airlines*, 69 F.3d 1205 (1st Cir. 1995). This decision is misguided, in refusing to allow civil rights victims to recover punitive damages, unless they have proven compensatory or nominal damages. The restrictive view of 42 U.S.C. §1981a, not only fails to conform with the express language of the statute, but also runs contrary to the overwhelming majority of circuit courts, who have addressed the issue.

In assessing the availability of punitive damages in Title VII cases, the vast majority of circuit courts have favored the imposition of punitive damages, even where there has been no showing of either nominal or compensatory damages. See *Tisdale v. Federal Express*, 415 F.3d 516, 534 (6th Cir. 2005), *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 357-8 (2d Cir. 2001), *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998) and *Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories*, 943 F.2d. 1151, 1520 (11th Cir. 1991).

These circuit courts have relied upon the objectives of punitive damages, and the need to impose a penalty against an employer, who intentionally violates civil rights as controlling. Recognizing the absolute need for deterrence, these courts have allowed recovery of punitive damages as a means of carrying out the statutory purpose.

"There is unseemliness for a defendant who engages in malicious or reckless violations of legal duty to escape either the punitive or deterrent goal of punitive damages merely because either good fortune or a plaintiff's unusual strength or resilience protected the plaintiff

from suffering harm". *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 357-8 (2d Cir. 2001). In that case, the Second Circuit also pointed out that Title VII's statutory limits should allay traditional concerns of large punitive damage awards, in the absence of compensatory damages. *Id.*

Indeed, even the First Circuit itself has questioned the reasoning of *Kerr-Selgas v. American Airlines*, 69 F.3d 1205 (1st Cir. 1995), in decision of *Provencher v. CVS Pharmacy*, 145 F.3d 5 (Ist Cir. 1998). In *Provencher*, the court adopted the Seventh Circuits "thoughtful analysis" in addressing the application of punitive damages, and held that they were recoverable, even in the absence of compensatory damages, where there is a back pay award. *Id.* at 12, Referring to *Hennessey v. Penril Datacom Networks, Inc.* 69 F.3d 1344, 1352 (7th Cir. 1995). In footnote 7 of that decision, the court calls into question the rationale of *Kerr-Selgas*, recognizing the fact that §1981a expresses no pre-requisite of compensatory damages for punitive damages.

In the recent decision of *Tisdale v. Federal Express*, 415 F.3d 516, 534 (6th Cir. 2005), the sixth circuit held that punitive damages were recoverable, even without nominal or compensatory damages, noting that, "[e]very court of appeals which has addressed the issue has upheld the punitive damages awards. *See, e.g., Corti v. Storage Tech. Corp.*, 304 F.3d 336, 341-42 (4th Cir.2002); *EEOC v. W & O, Inc.*, 213 F.3d 600, 615 (11th Cir.2000); *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 359 (2d Cir.2001); *Provencher v. CVS Pharmacy*, 145 F.3d 5, 12 (1st Cir.1998); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir.1998).

The Sixth Circuit reasoned that the common-law purpose of requiring compensatory damages as a

precondition to allowing punitive awards as ensuring a limitation on the amount which a jury could award "where the wrongs are insubstantial." *Cush-Crawford*, 271 F.3d at 358. Like the other circuits, the court held that this rationale does not hold in the Title VII context, and thus a precondition of compensatory damages is unwarranted.

Finally, in this Court's own decision of *Harris v. Forklift*, 510 U.S. 17 (1993), it was determined that a Title VII claim is actionable, even if it does not result in injury to the employee. While the case did not address punitive damages, it emphasized the importance of the statutory proscription over the necessity of proving damages.

In short, the decision and rationale of *Kerr-Selgas v. American Airlines*, 69 F.3d 1205 (1st Cir. 1995), is contrary to the concensus of this Court, the other circuits and the plain language of 42 U.S.C. §1981a. As such, the interests of comity necessitate that this Court consider the issue by allowing a Writ of Certiorari.

4. Punitive Damages are Appropriate Where There has been a Constitutional Violation

The District Court erred in refusing to allow the jury to consider punitive damages, where the jury found a 42 U.S.C. §1981 racial discrimination violation, in addition to the Title VII statutory violation.

This Court has long recognized the paramount importance afforded to Constitutional rights, in contrast to purely statutory rights. In the seminal case of *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), this Court pointed out that an individual who establishes a violation of rights under 42 U.S.C. §1981

(Civil Rights Act of 1866), is entitled to equitable and legal relief, including compensatory damages and under certain circumstances punitive damages.[10] No where in this or in any other decision of this court, has the right to punitive damages been conditioned on compensatory damages in the face of a 42 U.S.C. §1981 constitutional violation.

Likewise the First Circuit has never addressed the application of punitive damages without compensatory or nominal damages, where there is also a claim of constitutional violations enumerated under 42 U.S.C.§1981.

In *Timm v. Progressive Steel Treating, Inc. supra*, the Seventh Circuit however pointed out that the courts have long recognized a right to pursue punitive damages, even without actual damages, where there has been a constitutional violation under 42 U.S.C. § 1983. The court concluded that there is no reason to impose a compensatory-punitive link in cases involving Title VII and § 1981 claims, where there is none under § 1983. *Id.* At 1010.

Racial discrimination has long been subjected to heightened scrutiny in this country. Where an employee has been subjected to racially motivated ridicule and harassment, there is absolutely no just reason or precedent to precondition the deterrence of punitive damages on a successful recovery of compensatory or nominal damages. To do so would leave employers such as Respondent, to take solace that their reckless

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[10] Clearly, the "circumstances" under which punitives will be imposed addresses the extent to which the violation was reckless or intentional.

indifference to the constitutional rights of others, will go without consequence.

Nothing could be further from the spirit and intent of §1981
and the Thirteenth Amendment of the United States Constitution[11].

In short, the District Court and the First Circuit erred in refusing to remand this matter for a retrial on punitive damages in the face of a §1981 constitutional violation of civil rights.

5. The Issue as to the Applicability of Punitive Damages is Subject to Plenary Review, Where the Lower Court Decided the Issue on the Merits.

In denying the Petitioner's appeal, the First Circuit opined that the issue of punitive damages had been waived by trial counsel, who failed to properly object, pursuant to F.R.Civ.P. 51. This decision however failed to incorporate the reasoning of *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

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[11] Jordan's Meats, Inc. has been quick to point out that Mr. Azimi's counsel did not object to the court's jury instructions on the issue of punitive damages. This omission however, is moot as it was not relied upon by the District Court. Moreover, as emphasized in this brief, it was plain error to require a finding of compensatory damages, in order for the jury to consider punitive damages where there is no controlling law to that effect. See *Foster-Miller, Inc. v Babcock & Wilcox Canada*, 210 F.3d 1, 8 (1st Cir. 2000).

In that case, this Court recognized that the failure to object should not foreclose consideration of important issues, where the law is unclear or contrary to the instruction given.

While the failure to object to a jury instruction has traditionally only been reviewed for "plain error", this Court expanded plenary consideration in those cases where the lower court addressed an issue on the merits, where the issues were novel and important to the administration of justice. Reasoning that novel and important issues of law, such as the applicability of punitive damages should be addressed, even where there was no objection nor plain error. *Id.* At 255-257. The Court recognized that any objection having been made would have been moot in light of the Court's subsequent adverse ruling on the merits.

This case raises similar issues to those of *City of Newport* in that the lower court did rule on the merits (App. at 47a-48a), finding that punitive damages were unrecoverable without compensatory damages, even in the face of an intentional violation of constitutional and/or federally protected rights. As such, the courts below should have undertaken a plenary consideration of the applicability of punitive damages.

CONCLUSION

Based on the foregoing arguments, Mr. Azimi requests that this high court issue a Writ of Certiorari and consider the issues raised.

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(any footnotes trail end of each document)

No. 05-2602

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ABDUL AZIMI,
Plaintiff, Appellant,
v.
JORDAN'S MEATS, INC.,
Defendant, Appellee.

August 3, 2006, Decided

COUNSEL: Michelle Allot, with whom Daniel Bates, John Lemieux, and Farris Law were on brief, for appellant.

Lawrence C. Winger for appellee.

Stephanie E.F. Jazlowiecki, with whom Jeffrey Neil Young, McTeague, Higbee, Case, Cohen, Whitney & Toker, P.A., Zachary L. Heiden, and Maine Civil Liberties Union Foundation, were on brief, for Maine Civil Liberties Union Foundation, amicus curiae.

JUDGES: Before Lynch and Howard, Circuit Judges, and Stafford, * Senior District Judge.

OPINION BY: LYNCH

OPINION: LYNCH, Circuit Judge. A federal jury in Maine found that Abdul Azimi, a Muslim immigrant from Afghanistan, had suffered racial, religious, or ethnic harassment at his former workplace, Jordan's Meats, Inc., in violation of 42 U.S.C. § 1981 and Title

VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

The jury did not find that Azimi had suffered any harm for which it would award compensatory damages. Azimi had put on no evidence of any out-of-pocket costs he had incurred for medical treatment or psychological counseling, or of any wages lost as a result of the abuse he suffered at his workplace; instead, he relied only on his own testimony and the testimony of his wife and a friend about his emotional distress -- testimony that the jury reasonably rejected as a basis for awarding compensatory damages.

On appeal, Azimi, supported by amicus Maine Civil Liberties Union Foundation (MCLUF), advances the argument that, as a matter of law, a finding of a hostile work environment requires that there be an award of compensatory damages, even if a jury has rejected plaintiff's causation-of-damages evidence. This argument was long ago rejected by the Supreme Court.

Azimi also did not receive nominal damages. That is because he did not ask for them in a timely fashion; he chose not to submit the question of nominal damages to the jury, and he waited far too long to request them from the district court. He thus has forfeited the issue. Azimi now asserts that nominal damages must be awarded as a matter of law even if nominal damages were not timely requested. We reject the argument.

Because Azimi had not been awarded back pay, or compensatory damages, or nominal damages, the law of this circuit, at least with respect to his Title VII claim, is that he could not receive punitive damages. Although

Azimi now wishes us to reconsider that rule, he failed to timely raise this issue with the trial court. Further, as to both his Title VII and § 1981 claims, he did not object to the jury instruction on punitive damages or to the special verdict form, both of which stated that punitive damages could not be awarded if compensatory damages were not. Indeed, his argument that punitive damages ought not be contingent on compensatory damages was not made until his motion for a new trial, which was denied by the district court.

Azimi now asks that we hold that in § 1981 cases, whatever the rule in Title VII cases, there is no prerequisite that there be nominal or compensatory damages before punitive damages may be granted. We decline to reach the issue; it, too, was not preserved.

Finally, Azimi contends that the district court erred in entering summary judgment for Jordan's Meats on Azimi's unlawful discharge claims. Azimi had argued that his discharge was discriminatory and that it was also in retaliation for his earlier complaints to the Maine Human Rights Commission (MHRC). The district court found that Azimi had produced no evidence of pretext countering Jordan's Meats' explanation that it terminated Azimi's employment because he engaged in serious misconduct, including threatening a female co-worker in a dark parking lot. We affirm the district court's judgment in all respects. This case potentially raised a number of serious issues; none were preserved for appeal.

Where appropriate, we recite the facts in the light most favorable to the jury's verdict, *Torres-Rivera v.*

O'Neill-Cancel, 406 F.3d 43, 45 (1st Cir. 2005), and discuss the pertinent facts with the issues raised.

I.

A. Azimi's Claim for Compensatory Damages

Azimi was employed at the Jordan's Meats plant in Portland, Maine, from November 1999 to November 2001. During the period Azimi was employed, the company had about 150 full-time employees. Azimi worked in various positions while at the plant, including as a meat slicer and a meat stripper. At trial, Azimi testified that he had been the subject of discriminatory treatment and abusive and harassing behavior by some of his former co-workers and supervisors. The incidents of maltreatment are myriad and outrageous; we recite only a few examples.

On multiple occasions, one of Azimi's line leaders, Steve Mitton, physically obstructed the hot water tap so as to prevent Azimi from washing his hands, which were swollen from handling frozen meat. While Azimi was only allowed access to the cold water tap, Mitton permitted other, white employees to use the hot water.

Subsequently, Azimi was transferred to another department. There, a co-worker, George Libby, made numerous disparaging comments to Azimi about his religion, including: "If you eat pork and pussy, you become strong like me." When Azimi told Libby that both oral sex and the consumption of pork were against his religion, Libby said, "fuck you and fuck your God; fuck your religion." On separate occasions, Libby, whom Azimi described as weighing about three hundred

pounds, also grabbed Azimi by the neck and tried to shove pork into Azimi's mouth; held Azimi by the waist and pumped him from behind, simulating sexual intercourse; and told Azimi to "suck my dick" and, when Azimi took umbrage at the comment, picked Azimi up and dangled him, off the floor, by his arms, while other co-workers watched and laughed. Libby and another co-worker, Phil Ryan, also called Azimi on one of the phones in the plant and said to him, among other things, "Nigger, Sudan [sic] Hussein is waiting for you."

In addition to a number of other instances of verbal abuse and maltreatment by co-workers, Azimi was also subject to other offensive conduct, often by anonymous perpetrators. For example, he received an unsigned note in his locker; on one side of the note was scrawled a swastika and on the other side was written: Hey MotherFucker Why don't You GO BACK to your Own Country.

You don't bE long HERE you Fucking musselum You PIECE of Shit WE HATE YOU ALL ThE MUSSELUMS

You Don't don't bElong here AT JORDANSMEAT.

YOUR NOTHing but a Fucking NIGGER . . . .

Azimi also once found pieces of pork in the pockets of his work jacket; found a picture in his locker of Osama Bin Laden, on which was written the words "Abdul," "Mother Fucker," and "Your Dad need [sic] Help"; and discovered that his goggles and hearing-protection equipment were smashed to pieces, and that his

personal shoes had been taken from his work locker and stuck in the toilet.

Azimi testified that he reported the harassment to his supervisors; that Brian Smith, the Human Resources Manager, and other supervisors failed to adequately investigate the incidents and to impose appropriate punishment on the wrongdoers; and that the harassment continued despite his complaints and his supervisors' promises to address them.

After hearing the evidence, the jury found, by way of a special verdict form, that Azimi "was subjected to an offensive work environment that was hostile to his race, religion[,] or ethnic origin," and that Jordan's Meats "knew or should have known of the offensive hostile work environment and failed to take adequate and effective remedial measures." The jury, however, answered "no" to the question of whether "Defendant Jordan's Meats, Inc.'s unlawful harassment legally caused [Azimi] to be damaged by emotional distress, pain, suffering, emctional anguish, loss of enjoyment of life[,] and/or inconvenience."[1] As a result of this finding, the jury followed the district court's instructions and the special verdict form, and did not go on to consider what amount Azimi was entitled to recover as compensation for any injuries suffered. There were no objections to the special verdict form and the jury instructions, a point that we analyze later.

On appeal, Azimi's contention is that the jury was required to award compensatory damages, either as a matter of law or because the evidence compelled it.

Azimi, supported by the MCLUF, first argues that

inherent in a finding of a hostile work environment is a finding that the claimant suffered damages, such that any liability finding must be accompanied by an award of compensatory damages.[2] Azimi and amicus present the issue as one of inconsistency in the jury verdict. They also argue that the importance of the interests at stake requires that there be an award of damages.

Both arguments have been repudiated by the Supreme Court. Indeed, in *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978), the Court rejected, in the context of a claim under 42 U.S.C. § 1983, the arguments (1) that injury should be presumed from the violation of a constitutional right and (2) that damages should be awarded for a deprivation of a constitutional right regardless of whether any injury was caused. See *id.* at 254. The Court noted that "[r]ights, constitutional and otherwise, do not exist in a vacuum," and that "[t]heir purpose is to protect persons from injuries to particular interests," such that without proof of injury, no compensatory damages are possible. Id. (emphasis added); see also *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986) (noting that compensatory damages must be "grounded in determinations of plaintiffs' actual losses"); Carey, 435 U.S. at 264 ("[W]e hold that neither the likelihood of [mental and emotional] injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.").

Carey establishes that there is no presumption of injury and no automatic entitlement to damages. Cf. *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1239 (11th Cir. 2000) (stating, in the context of

reversing a class certification in a § 1981 case, that Carey "makes clear that in order to receive compensatory damages, individual plaintiffs must prove that 'injury actually was caused[,]'" and that "[t]his is especially true since compensatory damages under section 1981 can include damages for emotional and psychological distress").

In a later § 1983 case, the Court reiterated "that damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages." *Stachura*, 477 U.S. at 310; see also id. ("Carey thus makes clear that the abstract value of a constitutional right may not form the basis for § 1983 damages."). That role, if it is to be played at all, is played by nominal damages. *Id.* at 308 n.11 ("[N]ominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury."). So, too, here.

Nor do Title VII or § 1981 provide statutory authority for automatic or presumptive damages. "The availability of noneconomic damages [under these causes of action] does not mean that their recovery is automatic whenever a plaintiff prevails." Lindemann & Grossman, 2 Employment Discrimination Law 1828 (3d ed. 1996). "An award of damages for emotional distress must be supported by competent evidence of 'genuine injury,'" *Bailey v. Runyon*, 220 F.3d 879, 882 (8th Cir. 2000) (some internal quotation marks omitted) (quoting *Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 531 (8th Cir. 1999)), the proof of which is distinct from the proof required to show discrimination, see id. (citing *Browning v. President Riverboat Casino-Mo., Inc.*, 139

F.3d 631, 636 (8th Cir. 1998)); see also *id.* at 882 (rejecting the argument that emotional harm is "inherent" in a finding of liability for sexual harassment under Title VII, and noting that "[t]he Equal Employment Opportunity Commission (EEOC) has made clear that '[e]motional harm will not be presumed simply because the complaining party is a victim of discrimination'" (some internal quotation marks omitted) (second alteration in original) (quoting *Vadie v. Miss. State Univ.*, 218 F.3d 365, 376 (5th Cir. 2000) (quoting EEOC Policy Guidance No. 915.002 § II(A)(2) (July 14, 1992)))); Lindemann & Grossman, supra, at 1828 ("To qualify [for noneconomic damages under the employment anti-discrimination statutes], a plaintiff must prove that he or she sustained noneconomic injuries, such as emotional distress, pain and suffering, harm to reputation, and other consequential injury, caused by the defendant's unlawful conduct."). Injuries allegedly caused by the violation of Title VII or § 1981 must be proven to the factfinder -- here, a jury -- which may reasonably find, within the law, that while there has been harassment, the plaintiff has not been injured in any compensable way by it.[3] The district court quite correctly and succinctly noted that Azimi was improperly trying to eliminate causation of damages from the case.

Azimi's alternative argument is that the jury's decision not to award him any compensatory damages is against the weight of the evidence. On that basis, he contends that the district court erred both in denying his motion for a new trial on damages and in refusing to reconsider that denial. We review the district court's denial of motions for a new trial and for reconsideration for abuse of discretion. *Valentin-Almeyda v. Municipality*

of Aguadilla, 447 F.3d 85, 103-04 (1st Cir. 2006); *Soto v. Flores*, 103 F.3d 1056, 1063 (1st Cir. 1997). A district court "may grant a new trial only if [it is] convinced that the verdict is against the clear weight of the evidence, such that letting it stand would result in a miscarriage of justice." *Valentn-Almeyda*, 447 F.3d at 104. "In general, this rule applies to a verdict premised on a finding that no damages have been satisfactorily proven." *Quinones-Pacheco v. Am. Airlines, Inc.*, 979 F.2d 1, 4 (1st Cir. 1992). "When evidence of damage is equivocal, or a reasonable jury could determine that the plaintiff failed to prove an essential element of his or her case (such as causation), returning a 'zero damages' verdict is acceptable and the non-award will be set aside only if manifest injustice is in prospect." Id.

As noted above, it was Azimi's burden to prove that he was injured by the hostile work environment at Jordan's Meats. The only testimony on compensatory damages he offered came from him, his wife, and a close friend from his mosque. Azimi testified that the abuse he suffered at work caused him, inter alia, to become "stressed emotionally," to lose sleep and appetite, and to withdraw socially from his then fiancee (now wife), his son, and his friends. Azimi's wife testified that, as a result of the workplace harassment, Azimi became hurt, quiet, and withdrawn; that he developed sleeping problems; and that their marriage became strained. Azimi's friend also testified that during the time Azimi worked at Jordan's Meats, Azimi became "distressed[and] sad" and did not "want to do anything." None of these witnesses testified that Azimi sought medical treatment or counseling because of the harassment, that he suffered any out-of-pocket costs for such treatment or counseling, or that he lost any wages

or paid time from work as a result of what happened at work.

Jordan's Meats presented evidence that Azimi instigated or participated in some of the ugly exchanges with his co-workers and that he engaged in off-color joking and teasing with at least one of his harassers; that Azimi sought a permanent position at Jordan's Meats and continued to work at the plant despite the harassment;[4] and that Azimi's wife sought work at Jordan's Meats in 2001, well after most of the harassing incidents of which Azimi complained at trial had taken place.

The jury heard the testimony, and it was up to its members to evaluate it and the witnesses' demeanor and credibility. "'Translating legal damage into money damages -- especially in cases which involve few significant items of measurable economic loss -- is a matter peculiarly within a jury's ken'"; "[f]or just this reason, '[w]e rarely will override the jury's judgment on the appropriate amount of damages to be awarded.'" *Milone v. Moceri Family, Inc.*, 847 F.2d 35, 37 (1st Cir. 1988) (second alteration in original) (quoting *Wagenmann v. Adams*, 829 F.2d 196, 215 (1st Cir. 1987); *Brown v. Freedman Baking Co.*, 810 F.2d 6, 11 (1st Cir. 1987)); see also *Quinones-Pacheco*, 979 F.2d at 3 (noting that "a trial judge does not sit as a super-juror, free to disregard the considered verdict of a properly instructed jury 'merely because he disagrees with it or would have found otherwise in a bench trial'" (quoting *Milone*, 847 F.2d at 37)); *Peckham v. Cont'l Cas. Ins. Co.*, 895 F.2d 830, 837, 839 (1st Cir. 1990) (observing that "[c]ausation questions . . . are normally grist for the jury's mill" and that the appellate court

"cannot reject possibilities rooted in the record merely because, if sitting as factfinders, we [might] have drawn a different set of conclusions").

Although a reasonable jury could have awarded damages based on the evidence presented, there is no plausible argument that on these facts a reasonable jury was compelled to give a compensatory damages award. See *Bailey*, 220 F.3d at 880-81 (rejecting plaintiff's theory that jury was required to credit his evidence of emotional harm stemming from sexual harassment, and finding no abuse of discretion in trial judge's denial of new trial on damages); see also *id.* at 881 (noting that "'[m]edical or other expert evidence is not required to prove emotional distress'" and that "'[a] plaintiff's own testimony, along with the circumstances of a particular case, can suffice to sustain the plaintiff's burden in this regard,'" but that plaintiff was nonetheless "required 'to convince the trier of fact that [he] actually suffered distress because of the [Title VII violation] itself'" (alterations in original) (some internal quotation marks omitted) (quoting *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065 (8th Cir. 1997); *Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996))); cf. *Beard v. Flying J, Inc.*, 266 F.3d 792, 803-04 (8th Cir. 2001); *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 843 (11th Cir. 1991).

B. Nominal Damages And Punitive Damages

Azimi also appeals the denial of nominal damages. One might ask why the parties should care on appeal about whether a nominal damages award, for as little as one dollar, should be ordered.[5]

The reason that a nominal damages award is significant here is because the law of this circuit is that no punitive damages may be awarded in a Title VII case in the absence of an award of compensatory damages or of nominal damages. We so held in *Kerr-Selgas v. American Airlines, Inc.*, 69 F.3d 1205 (1st Cir. 1995), see id. at 1214-15, and have reiterated the rule in dicta in subsequent cases, see *Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 399 F.3d 52, 65 n.12 (1st Cir. 2005); *Campos-Orrego v. Rivera*, 175 F.3d 89, 97 (1st Cir. 1999); *Provencher v. CVS Pharmacy, Div. of Melville Corp.*, 145 F.3d 5, 11-12 (1st Cir. 1998) (noting Kerr-Selgas, but distinguishing it and allowing a punitive damages award to stand on the basis that although plaintiff had not been awarded compensatory or nominal damages, he had been awarded backpay).

In Kerr-Selgas, the rule that punitive damages were not available absent an award of nominal or compensatory damages was derived from the common law, not from the statutory language. See *Kerr-Selgas*, 69 F.3d at 1214 ("[G]enerally a claimant may not recover punitive damages without establishing liability for either compensatory or nominal damages." (citing *Cooper Distrib. Co., Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 281-83 (3d Cir. 1995); Restatement (Second) of Torts § 908 cmts. b, c (1979))). The Kerr-Selgas rule has been criticized. See, e.g., *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 357-59 (2d Cir. 2001) (disagreeing with Kerr-Selgas because, among other reasons, "[t]here is . . . no one common law rule" and "the statutory maxima capping punitive damage awards [under Title VII] strongly undermine the concerns that underlie the reluctance to award punitive damages without proof of actual harm"). And

at least three circuits do not make punitive damages in Title VII and § 1981 cases contingent on there being an award of compensatory or nominal damages. See *Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 534-35 (6th Cir. 2005); *Cush-Crawford*, 271 F.3d at 359; *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010-11 (7th Cir. 1998). Indeed, only one other circuit appears to follow the Kerr-Selgas rule.[6] See *Louisiana ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 303 (5th Cir. 2000) (holding, in the context of a Fair Housing Act case, that punitive damages are not available, absent an award of actual damages, except in cases where a violation of a constitutional right has occurred).

On appeal, Azimi would like to challenge the Kerr-Selgas rule and get a remand for a trial on punitive damages. He argues that 42 U.S.C. § 1981a, which sets forth damages available in certain actions under Title VII,[7] does not require compensatory or nominal damages to be awarded as a predicate to an award of punitive damages. Rather, he argues, that provision states only one precondition to an award of punitive damages: that "the complaining party demonstrate[] that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). He also argues that the Kerr-Selgas rule applies only to Title VII cases and that this circuit has never addressed whether punitive damages were available, in the absence of compensatory or nominal damages, under § 1981. We do not address these arguments. His objections come too late.

Azimi did not object on the grounds articulated here to the jury instructions on punitive damages, either before or immediately after the jury was instructed. Nor did he object on these grounds to the special verdict form. Indeed, he did not raise a challenge to the punitive damages instruction until he filed his motion for a new trial on damages. He thus has forfeited the issue, see Fed. R. Civ. P. 51(b)(2), (c)(2) (stating that a party that has been informed of an instruction before the jury is instructed and before final jury arguments must object to the instruction on the record "before the instructions and arguments are delivered"); see also Fed. R. Civ. P. 51(d)(1)(A), if not waived it entirely. When the issue was finally presented in a motion for a new trial, the district court found that the claim came too late. The court also said correctly that it was bound by the *Kerr-Selgas* rule.

Had Azimi presented the issue in a timely fashion before the district court and preserved it for appeal, this panel would ordinarily also be bound by Kerr-Selgas.[8] But we do not address the question because Azimi did not timely raise the issue. For the same reason, we also do not address the question of whether punitive damages may be awarded in a § 1981 case in the absence of a compensatory or nominal damages award.

Azimi asks us to resort to plain error review. But plain error review would not help him here. It is hardly plain that the Kerr-Selgas rule is error. Moreover, as Azimi concedes, we have never addressed the rule in the context of a § 1981 case, so there is no plain error with respect to that argument either.[9]

Azimi did have an easy alternative if he wanted the jury to consider awarding him punitive damages: he could have asked for nominal damages in a timely fashion.

In situations in which an employer has been found to have violated the law, but the jury awards no compensatory damages, the Supreme Court has said in procedural due process cases that a district court ordinarily should award nominal damages. In *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992), a case under 42 U.S.C. § 1983, the Court stated that a finding of a procedural due process violation unaccompanied by a finding of actual injury "obligates" a district court to award nominal damages. *Id.* at 112 (citing *Carey*, 435 U.S. at 266).

This circuit has adopted this rule of obligatory nominal damages, but we have thus far done so only for constitutional procedural due process claims. See *Campos-Orrego*, 175 F.3d at 98. Azimi asks that we extend the rule to cover his Title VII and § 1981 claims. He points out that at least one circuit has done so, at least with respect to a § 1981 claim; indeed, the Eighth Circuit has held that "proof of a Section 1981 violation automatically entitled [plaintiff] to nominal damages." *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 652 (8th Cir. 1990), vacated on other grounds, 499 U.S. 914, 111 S. Ct. 1299, 113 L. Ed. 2d 234 (1990). The Eighth Circuit rule, however, is not the rule of all the circuits; in fact, the Eleventh Circuit has expressly refused to extend Carey to Title VII claims. See *Walker*, 944 F.2d at 845 ("Nothing in Carey mandates the award of nominal damages for statutory violations."). Still, we will assume arguendo, and in Azimi's favor, that the rule set forth in

Campos-Orrego, that proof of deprivation of procedural due process in a § 1983 action usually will lead to an award of nominal damages, extends to Title VII and § 1981 cases.

Regardless of whether an award of nominal damages is obligated in a Title VII and § 1981 case where liability has been found, a request for nominal damages may be forfeited, and has been forfeited here. This court has made clear that "[a]lthough nominal damages are recoverable in intentional discrimination cases under 42 U.S.C. § 1981a(a)(1), . . . a liability verdict [does not] compel[] such an award absent a timely request." *Kerr-Selgas*, 69 F.3d at 1215; see also *Campos-Orrego*, 175 F.3d at 98 (noting that the entitlement to nominal damages is not "automatic" and that "it is incumbent upon the plaintiff to make a timely request for nominal damages"); accord *Oliver v. Falla*, 258 F.3d 1277, 1281-82 (11th Cir. 2001) (agreeing with our rule and citing cases).

In this circuit, a "plaintiff may request the judge to instruct the jury on nominal damages, or in the absence of such an instruction, may ask the trial court for nominal damages on the occasion of, or immediately after, the return of the verdict." *Campos-Orrego*, 175 F.3d at 99. Our rule is plaintiff-friendly in the sense that it does not require that plaintiffs make a strategic choice whether to ask for a nominal damages instruction. Indeed, there are good reasons why a plaintiff may choose not to give a jury the "out" of awarding nominal damages as an alternative to awarding compensatory damages. Azimi may have made such a tactical choice here, and he is bound by his choice.

If, as here, the plaintiff chooses not to give the jury the nominal damages question, then he or she must make a timely request to the court by requesting nominal damages "on the occasion of, or immediately after, the return of the verdict." Azimi, however, did not make a timely request that the court decide whether nominal damages should be awarded.[10] Indeed, Azimi did not clearly request nominal damages until July 26, 2005 -- three months after the verdict was returned on April 25, 2005. That request for nominal damages came in his motion for reconsideration of the district court's denial of his initial motion for a new trial, and was presented only after the district court noted, in denying the motion for a new trial, that Azimi was not entitled to punitive damages, in the absence of an award of compensatory damages, because he had made no request for nominal damages. In that same order, the district court correctly stated that even if such a request had been made in the initial motion for a new trial, the request would have been untimely anyway.

As a general rule, a plaintiff must make a timely claim for all damages he seeks. This rule takes on special importance in cases like this one, in which the availability of one type of damages is conditioned upon the award of another. There is a right to jury trial on damages, including punitive damages, in Title VII and § 1981 cases. See 42 U.S.C. § 1981a(c)(1) (providing for jury trials in Title VII cases, so long as the complaining party is requesting compensatory or punitive damages); *United States v. Burke*, 504 U.S. 229, 240, 112 S. Ct. 1867, 119 L. Ed. 2d 34 (1992) ("42 U.S.C. § 1981[] permits victims of . . . employment discrimination to obtain a jury trial at which 'both equitable and legal relief, including compensatory and, under certain

circumstances, punitive damages' may be awarded." (quoting *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975))). If the jury is to consider whether to award, and the appropriate sum of, punitive damages, then the issue must be submitted to the jury before it is discharged. Cf. *Walker*, 944 F.2d at 845 (declining to reverse district court's failure to award nominal damages for a Title VII violation where plaintiff failed to submit the issue to the jury, in part because of "[t]he federal court's long standing policy against additur, as an intrusion on the jury's domain and violation of the Seventh Amendment"). This means that the question of whether preconditions for an award of punitive damages are met, such as the preconditions set forth in Kerr-Selgas, must be answered either before, on the occasion of, or immediately after the jury verdict. In this case, both the motion for a new trial and the motion for reconsideration were filed long after the jury ended its deliberations. Azimi thus has forfeited his claim for nominal damages.[11]

II.

Grant of Summary Judgment on the Unlawful Discharge Claims

We turn to Azimi's final argument: that his unlawful discharge claims should not have been resolved against him on summary judgment.[12]

The district court, after oral argument, adopted and affirmed the magistrate judge's recommended decision granting summary judgment in favor of Jordan's Meats on Azimi's unlawful discharge claims. We review the

court's grant of summary judgment de novo, *Colburn v. Parker Hannifin/Nichols Portland Div.*, 429 F.3d 325, 329 (1st Cir. 2005), drawing all reasonable inferences in favor of the non-movant, *Nadherny v. Roseland Prop. Co.*, 390 F.3d 44, 48 (1st Cir. 2004). "'Even in employment discrimination cases where elusive concepts such as motive or intent are at issue,' summary judgment is appropriate if the non-moving party rests 'merely upon conclusory allegations, improbable inferences, and unsupported speculation.'" *Benoit v. Technical Mfg. Corp.*, 331 F.3d 166, 173 (1st Cir. 2003) (quoting *Feliciano de la Cruz v. El Conquistador Resort & Country Club*, 218 F.3d 1, 5 (1st Cir. 2000)). "[T]o defeat a properly supported motion for summary judgment, the nonmoving party must establish a trial-worthy issue by presenting 'enough competent evidence to enable a finding favorable to the nonmoving party.'" *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 842 (1st Cir. 1993) (quoting *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1116 (1st Cir. 1993)).

In analyzing Azimi's unlawful discharge claim, we employ, as did the parties and the district court, a modified version of the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Rivera-Garcia v. Sistema Universitario Ana G. Mendez*, 442 F.3d 3, 5 (1st Cir. 2006). Under this framework:

a plaintiff employee must carry the initial burden of coming forward with sufficient evidence to establish a prima facie case of discrimination or retaliation. If he does so, then the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason

for the employee's [termination]," sufficient to raise a genuine issue of fact as to whether it discriminated against the employee. . . . If the employer's evidence creates a genuine issue of fact, the presumption of discrimination drops from the case, and the plaintiff retains the ultimate burden of showing that the employer's stated reason for terminating him was in fact a pretext for retaliat[ion or discrimination] . . . .

Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 160-61 (1st Cir. 1998) (first alteration in original) (citations omitted) (quoting *McDonnell Douglas*, 411 U.S. at 802).

Jordan's Meats does not argue that Azimi failed to make out a prima facie case of unlawful discharge; rather, it contends that Azimi failed to produce sufficient evidence to allow a reasonable jury to conclude that his firing was a pretext and was actually motivated by retaliation or discrimination. We thus assume that Azimi has made out a prima facie case and go directly to the issues of pretext and motivation.

Jordan's Meats produced admissible evidence that Brian Smith, the Human Resources Manager, and Russell Cram, Azimi's immediate supervisor, jointly made the decision to discharge Azimi after he engaged in five related acts of what the company perceived to be "serious misconduct." Specifically, Smith's affidavit listed the following incidents as having led to the termination of Azimi's employment: (1) Azimi threatened and intimidated a female co-worker, Mercedes Manning, while she was alone in a dark parking lot at 6 a.m. before work; (2) Azimi attempted a second time to approach Manning in the parking lot; (3) Azimi lied when confronted with Manning's allegations;

(4) Azimi made a false allegation against co-worker Harry Adams; and (5) Azimi threatened Adams in the presence of their supervisor, Russell Cram. Smith stated that Jordan's Meats "would never let -- and . . . had never let -- any employee get away with the kind of misconduct engaged in by Mr. Azimi."

Smith's affidavit was supported by, inter alia, business records of Jordan's Meats,[13] see Fed. R. Evid. 803(6), which consisted of contemporaneous notes, which were taken by two staff members of the Human Resources Department at the meeting in which Manning reported that Azimi threatened her, and which detail Manning's allegations and the staff members' personal observations of Manning's demeanor; a signed statement from Manning reiterating her allegations against Azimi; a signed statement from Cram, who was Azimi, Adams, and Manning's immediate supervisor; stating his firsthand observation of Azimi "angrily threatening [Adams]," as well as other reasons for his recommending that Azimi be fired; and a written record of the company's investigation of, and response to, two complaints made by Azimi of what the company characterized as "minor" harassment by co-workers.

We initially describe Manning's complaints against Azimi about two incidents, one on November 8 and another on November 12, 2001. We focus on the Manning incidents for several reasons. First, Azimi's opposition to summary judgment did not deny that Manning made those allegations against him and did not argue that Manning had any reason to falsely accuse him. Second, no inference of pretext can be raised from the company's response to Manning's complaint. Jordan's Meats' investigation into Manning's

allegations, which was conducted in large part by persons who had no prior history with Azimi, was reasonable and led the company to conclude that Manning was credible and that Azimi was not. The severity of the discipline that Jordan's Meats meted out as a consequence -- termination of employment -- does not itself raise any inference of pretext or of discrimination or retaliation. Third, Azimi has produced no evidence of disparate discipline to show that other employees who engaged in equivalent conduct of physically intimidating and also threatening a vulnerable female co-worker in order to induce her to lie and then lying about it were not terminated.

Manning's charge was that Azimi confronted her while she was alone in the dark parking lot at 6 a.m. on November 8 and demanded that she substantiate his version of an altercation that had occurred between him and Adams, which Manning had witnessed the day earlier. According to Manning's signed statement, Azimi "threatened that if [she] did not tell the boss what [Azimi] wanted that [Azimi] would tell the supervisor that Adams touches himself in front [of her] (demonstrated by grabbing his crotch) and that Adams touches [her] in a sexual way." Manning stated that Azimi's accusations were untrue and that Adams had never touched her or himself in her presence.

According to Manning's statement, after Azimi threatened her in the parking lot, Manning "did not know what to do." Therefore, that very day, she confided in a fellow co-worker, Estaban Batista. At Batista's encouragement, Manning reported the incident to her supervisor, Cram, the next morning, which was Friday, November 9. After telling Cram her

account of the events, she was interviewed, in Cram's presence, by two members of the Human Resources Department, Sonya Voutour and Trish Thorpe. Also present at the meeting was Norma Finnegan, Manning's co-worker, who translated for Manning, whose first language is Spanish. Voutour's contemporaneous notes, from which we quote, give Manning's account of the November 8 incident:

At approximately 6:10 am on Thursday, November 8, 2001[,] Mercedes arrived at the parking lot across the street from Amatos. Abdul Azimi was in the parking lot and came up to her car as she pulled into the parking lot. Abdul told Mercedes to park her car in this spot. Mercedes was frightened and said, NO and that she would park on the other side of the parking lot. Abdul kept insisting that she park her car here. Mercedes parked on the other side still. Abdul came up to where she parked her car and walked with her to the building. Abdul told her that she must tell her supervisor, Russ Cram[,] that Harry Adams used a "Bad Word" when they were arguing yesterday (Wednesday). Mercedes told him that the problem was between Harry and himself (Abdul) and not with her. Abdul frightened her by insisting that she must tell Russ Cram that Harry used a "Bad Word" with Abdul during the incident. Mercedes asked why he was getting her involved with a problem between Harry and himself (Abdul). Abdul told Mercedes that if she did not tell Russ that Harry used a "Bad Word" with Abdul then he would say bad things to people. Mercedes demonstrated the gesture Abdul used when saying the next line. Mercedes lifted her sweatshirt up a bit and grabbed for her crotch area. Abdul told her that he would tell people that Harry would grab himself, in a sexual way, and point it toward

Mercedes. He (Abdul) would also tell people that Harry would grab Mercedes in a sexual way. Mercedes told Abdul that it wasn't her problem[,] and the problem was between Harry and himself (Abdul).

Other contemporaneous notes by Thorpe of the meeting are consistent with Voutour's and add that "Mercedes was visibly upset and near tears many times" as she told her story. Thorpe also noted that Manning said that she told Azimi that she did not hear Adams say what Azimi accused Adams of saying and asked Azimi why he "wanted his problem to be her problem." Thorpe also noted that Manning denied that Adams had ever touched her, and said that she was happily married. Finally, Thorpe noted that "Mercedes stated that she was worried about coming into work because it is dark when she arrives," and that Cram told Manning that he would make sure that someone would be there to escort her into the plant in the morning.

In sum, Manning told the Human Resources Department that she was afraid of Azimi, and to others she appeared genuinely afraid. Manning also told the Human Resources Department and reiterated in her own signed statement that Azimi insisted that she get involved in his problems, that Azimi told her to lie, and that when she refused, Azimi threatened to disseminate lies about her and Adams concerning the sensitive topic of sexual conduct. It is self-evident that Azimi's threatened statements would cause serious problems for Manning with her husband, with Adams, and in her workplace.

According to Manning's statement, on Monday, November 12, the next work day after she reported the

incident with Azimi to her supervisor and the Human Resources Department, she saw Azimi sitting in his car in the same parking lot, with his car's lights off and engine running, which caused her to be "afraid" that he was planning to confront her again. According to Smith's deposition, a supervisor had to go to the parking lot and escort Manning into the plant. As a result of the incidents, Manning said that she filed a complaint against Azimi with the Portland Police Department shortly after the November 12 incident.

Jordan's Meats placed Azimi on indefinite suspension while the company initiated an investigation of Manning's allegations, and, the record shows, Azimi was eventually terminated on November 19, 2001, ten days after Manning made her initial complaint. According to Smith's deposition, as part of the investigation, Smith, who was out of town on November 8 and 9, personally interviewed Manning when he returned to the plant on November 12. Manning repeated to Smith the allegations against Azimi and told Smith of her plans to file a police report about the incident. Smith stated in his deposition that the police did, in fact, follow up on Manning's allegations.

A few days after speaking with Manning, Smith and Cram interviewed Azimi. According to Smith's affidavit, Azimi "repeatedly and strongly denied any and all wrongdoing and gave exculpatory explanations for his parking lot conduct (i.e., that he was just there smoking a cigarette and not waiting for Ms. Manning[,] that Ms. Manning's English is so poor that he could not possibly have threatened her as she claims, and she must have misunderstood what happened)."

Smith explained that he ultimately credited Manning's account for several reasons. According to Smith's affidavit, he and his staff spoke directly with Manning, and from personal observation, he noted that Manning, whom he described as "a small, vulnerable, Hispanic woman," struck him as genuinely "terrified" of Azimi. At his deposition, Smith said that he was convinced that Manning did, in fact, understand what Azimi had said to her that day in the parking lot, because Smith himself had engaged in conversations in English with Manning and it was his experience that "[s]he can understand [English] a lot better than she speaks it." Smith also testified that Cram had told him that Manning's account was corroborated 'almost verbatim' by someone else. In fact, Smith's impression was that Cram had told him that this other source was Azimi himself. Finally, Smith noted that Manning was not involved in any of the previous incidents of harassment complained of by Azimi.

In addition to Manning's allegations, Smith also relied on as grounds for terminating Azimi the signed statement by Cram, in which Cram detailed a number of other reasons, in addition to the incidents with Manning, why he supported terminating Azimi's employment. Of particular significance to Smith was Cram's statement that "on the afternoon of November 7, 2001 in my office and in my presence, [Azimi] very angrily threatened another male team member [Adams] to settle things outside." Cram said that he was "concerned and frightened" by "the terrifying expression on . . . Azimi's face and in his eyes when he" made this threat. Cram also noted that "Azimi had a history of not being cooperative with" co-workers and that "[m]any allegations were made against . . . Azimi,

but he always denied any wrong doing." Finally, Cram stated that "there have been credibility issues" with Azimi. As an example, Cram said that one of Azimi's co-workers had reported that an anonymously written racist note that Azimi found in his locker was actually planted by Azimi himself; the co-worker "explained in vivid detail that . . . Azimi had showed him the note and admitted he had planted it." Smith confirmed at his deposition that the employee, Kurt Chim, had indeed come forward in February 2001, about a year after Azimi complained about the note, and told Smith that he had talked with Azimi, that Azimi had admitted placing the note in his own locker, and that Azimi believed the planting of the note would help him get hired full time. Chim, whom Smith found credible, explained that he had not wanted to get involved initially because he did not want to be perceived as a "rat." Chim also told Smith that he had gone to high school with Azimi and that it was his opinion that Azimi had always been a dishonest person.

Whether Azimi told the truth about the Manning and Adams incidents is not the point. Jordan's Meats had a substantial basis for concluding that Azimi was not credible and had engaged in the misconduct charged.

In response to these specific reasons that Jordan's Meats offered for terminating him, Azimi offered only the following evidence in support of his opposition to summary judgment: (1) his own deposition testimony, which he characterizes as denying Manning's allegations; and (2) an administrative decision by the Maine Department of Labor (MDOL) regarding his eligibility for unemployment benefits. He also relies on two other arguments: (1) that he was terminated for his

misconduct, while others were not disciplined for what he claims was equivalent misconduct; and (2) that he was fired nine months after he filed his second complaint with the MHRC and two months after the September 11, 2001 attacks. We consider each in turn.

Azimi's opposing statement of material facts merely offered this conclusory allegation:

In retaliation for Mr. Azimi's charges of discrimination filed [with] the Maine Human Rights Commission and as a further act of discrimination, Defendant discharged Plaintiff on false grounds on November 19, 2001. Azimi Deposition at 249-264.

The referenced deposition pages do not refute the employer's explanation about believing what Manning and Cram said had happened. Those pages merely recount Azimi's version of the November 8 incident, which was that he was smoking a cigarette by his car in the parking lot when Manning approached him and said "I am sorry" and something about "Harry Adams"; that Azimi did not understand what Manning was saying because she was speaking Spanish; that the only thing he said to Manning was that she should "talk to Russell"; and that he and Manning walked into the plant together. Azimi did not deny that Manning made the complaints against him, did not explain why the account that Manning gave on a consistent basis each time she described it differed so much from his own, and did not give any reason why Manning would lie to her employer about what happened in the parking lot.

Azimi's denial of wrongdoing is not enough to raise an inference of pretext, on these facts, where the company undertook a reasonable investigation, heard his side of

the story, and decided that his accuser's was more credible. "In assessing pretext, a court's 'focus must be on the perception of the decisionmaker,' that is, whether the employer believed its stated reason to be credible," subject to some limitations not present here. *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 824 (1st Cir. 1991) (quoting *Gray v. New Eng. Tel. & Tel. Co.*, 792 F.2d 251, 256 (1st Cir. 1986)); see also *Rivera-Aponte v. Rest. Metropol # 3, Inc.*, 338 F.3d 9, 11-12 (1st Cir. 2003) ("Whether a termination decision was wise or done in haste is irrelevant, so long as the decision was not made with discriminatory animus."). Although an "employer's good faith belief is not automatically conclusive," *Zapata-Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 46 (1st Cir. 2002), "[i]t is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real [and unlawful] motive" of discrimination, *Mesnick*, 950 F.2d at 824 (internal quotation mark omitted) (quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990)). Azimi has not made that showing here.

Azimi also relies on a decision from an unemployment benefits hearing before the MDOL, in which the MDOL concluded that Jordan's Meats had not met its burden of proving that Azimi was ineligible to receive certain unemployment benefits because he had engaged in misconduct within the meaning of Me. Rev. Stat. Ann. tit. 26, § 1043(23)(A)(10). See Me. Rev. Stat. Ann. tit. 26, § 1193(2) (disqualifying a claimant "discharged for misconduct connected with his work" from benefits for a certain period of time). Azimi observes that the MDOL

had reached its decision in large part because it determined that Manning's English skills were so limited as to undermine Jordan's Meats' account of the parking lot incident. Azimi argues that the MDOL's reasoning is enough to raise a material dispute of fact about the credibility of Jordan's Meats' explanation for terminating him.

The MDOL decision, however, does not in its conclusion or rationale help him. That decision merely found the employer had not "prove[d] that [Azimi's] conduct [met] the statutory definition of misconduct." It did not address or find that Jordan's Meats had no reasonable basis to believe that Azimi had engaged in misconduct or even that Manning herself was not credible; in fact, the MDOL specifically noted that Manning, who was called to testify, "testified that she felt threatened by the encounter in the parking lot." Nor did the MDOL even purport to address the questions of whether Azimi had been more harshly disciplined than a similarly situated employee, or, if so, whether the difference in treatment was motivated by an intent to discriminate or retaliate.

In contrast, at the summary judgment stage, it is up to Azimi to produce sufficient evidence to generate a material dispute of fact that Jordan's Meats' articulated reasons for firing him were pretext. Most importantly -- even if Azimi were to show that he did not, in fact, threaten Manning and, further, that Jordan's Meats knew that he did not and fired him anyway -- Azimi still must produce sufficient evidence from which a jury could reasonably infer that the real reason Jordan's Meats fired him was because of discrimination or retaliation.

Azimi argues that a jury could reasonably infer that Jordan's Meats was motivated by discriminatory or retaliatory animus, because he was terminated for his misconduct while other employees were disciplined more leniently for similar misbehavior. There were four types of misconduct leading up to the termination decision, according to Smith: (1) the two incidents in the parking lot with Manning; (2) lying about the Manning incident; (3) making false allegations against Adams; and (4) threatening Adams in the presence of Cram. This case does not involve, as Azimi seems to argue, only the third and fourth categories of misconduct. This case involves, in addition to those two categories, intimidating a female co-worker in a dark parking lot, threatening to spread rumors about her if she did not lie, and putting her in genuine fear. Azimi has provided no evidence of comparable misconduct and has not met his burden of providing evidence that the employment of co-workers who had committed misconduct similar to that act or that combination of acts were not also terminated.

In his statement of material facts, Azimi refers to Jordan's Meats' failure to terminate the employment of co-workers whom he accused of calling him names and using off-color or obscene language. Use of such language, not uncommon on a meat-processing plant floor, is simply not similar to the conduct in which Azimi was reported to have engaged. More serious are his claims that George Libby engaged in inappropriate roughhousing by "grabb[ing Azimi] hard by the waist [and] thrusting his [Libby's] groin into [Azimi's] buttocks," and that Azimi felt threatened when another co-worker said that she was going to break his "fucking teeth out." That Jordan's Meats, which investigated the

incidents, concluded that neither Libby's conduct nor an angry exchange between mutually abusive co-workers was the equivalent of the behavior for which Azimi was terminated does not raise an inference of discrimination. Indeed, Jordan's Meats had reason to believe that Azimi may have been the instigator of some of these verbal and physical exchanges.

In fact, there was undisputed evidence in the summary judgment record that at least one co-worker, Libby, complained that Azimi himself had directed verbal insults and physical conduct toward Libby, which was offensive and threatening. Yet Azimi was not disciplined as a result. Libby complained to Smith that Azimi had called Libby names, such as "fat ass"; that Azimi also had grabbed him from behind and humped him; that Azimi had "on many times" tried to grab him and restrain him; and that Libby was afraid of Azimi.

The record shows that Jordan's Meats did, in fact, discipline Libby and other co-workers whom the company found to have harassed Azimi. The female co-worker who threatened to break Azimi's teeth was issued a warning; Libby was suspended for three days for his harassment of Azimi and would have been terminated if his conduct had not improved; and another co-worker, Phil Ryan, was suspended for one day for phoning Azimi and making racist comments, after Ryan said Azimi called him "a fat ass" and told him that he was going to "cut his fat ass."

Nor does Azimi offer any evidence from which a jury could reasonably infer that the individuals who made the decision to terminate him -- specifically, Smith and Cram -- harbored any type of discriminatory or

retaliatory animus toward him. That Smith, as the Human Resources Manager, and Cram, as Azimi's supervisor, dealt with some of Azimi's complaints of pre-termination harassment, is not enough to allow the inference that they terminated him because of unlawful animus.[14] In fact, the evidence in the record tends to show that Smith and Cram were sympathetic to many of Azimi's complaints and were trying to stamp out any discrimination at the company. For example, according to Smith's deposition, when Azimi found the note in his locker in 1999, Smith undertook an investigation. He even forwarded the note and handwriting samples to a handwriting expert, who could not identify the author. Smith then had several meetings with small groups of employees on three shifts, informed them that the letter was despicable and that such conduct would not be tolerated in the company, and distributed a memo he wrote on workplace behavior and diversity awareness.

Finally, Azimi suggests that a reasonable factfinder could infer animus from the fact that he was fired within nine months of the filing of his second complaint with the MHRC and within two months after the September 11, 2001 attacks on the World Trade Center and other targets. Nine months is simply too long a time lapse to support an inference of retaliatory animus. When Azimi has proffered no additional evidence of discriminatory animus on the part of Smith or any other decisionmaker, the fact that he was fired two months after September 11 also is not enough to generate a material dispute of fact on the unlawful discharge theory.

Drawing all reasonable inferences in Azimi's favor, we conclude based on our review of the summary judgment

record that summary judgment was warranted in relation to the unlawful discharge claims. The law does not protect the jobs of those who threaten other employees with harm, even if they themselves have been mistreated. That Azimi was wronged gave him no right to do wrong.

III.

Judgment affirmed. Each side shall bear its own costs.

Footnotes

* Of the Northern District of Florida, sitting by designation.

n1 The special verdict form and the jury's answers read as follows:

1. Has Plaintiff, Abdul Azimi, proven by a preponderance of evidence that he was subjected to an offensive work environment that was hostile to his race, religion or ethnic origin?

Yes X No

[If you answered Question 1 "YES," go on to Question 2. If you answered Question 1 "NO," then answer no further questions.]

2. Has Plaintiff, Abdul Azimi, proven by a preponderance of evidence that Defendant, Jordan['s] Meats, Inc., knew or should have known of the offensive hostile work environment and failed to take adequate

and effective remedial measures?

Yes X No

[If you answered Question 2 "YES," go on to Question 3. If you answered Question 2 "NO," then answer no further questions.]

3. Has Plaintiff, Abdul Azimi, proven by a preponderance of evidence that Defendant Jordan's Meats, Inc.'s unlawful harassment legally caused Plaintiff to be damaged by emotional distress, pain, suffering, emotional anguish, loss of enjoyment of life and/or inconvenience?

Yes No X

[If you answered Question 3 "YES," go on to Question 4. If you answered Question 3 "NO," then answer no further questions.]

4. What amount is Plaintiff entitled to recover from Defendant as compensation for those damages found in answer to Question 3?

($.)

[Write out in words] [Figures]

[Answer question 5.]

5. Has Plaintiff, Abdul Azimi, proven by a preponderance of evidence that Defendant's supervisory or managerial personnel acted with malice

or with reckless indifference to Plaintiff's federally protected right to be free from unlawful discrimination?

Yes No

[If you answered Question 5 "YES," then answer Question 6. If you answered Question 5 "NO," then answer no further questions.]

6. What amount of punitive damages should be awarded to Plaintiff?

($.)

[Write out in words] [Figures]

n2 This argument is predicated on the fact that to establish a case of hostile work environment under Title VII, a plaintiff must demonstrate, inter alia, "that the work environment was 'both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that [the plaintiff] in fact did perceive to be so.'" *Conto v. Concord Hosp., Inc.*, 265 F.3d 79, 82 (1st Cir. 2001) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)). Amicus argues that "[i]t cannot be possible that the Jordan's Meats workplace was both objectively and subjectively offensive such that a reasonable person would find it hostile or abusive, and that Mr. Azimi in fact did perceive [it to] be so, and yet Mr. Azimi sustained no injury from that experience."

n3 Azimi argues that *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993),

stands for the proposition that a plaintiff need not demonstrate any specific harm in order for a claim to be compensable, and that he was thus entitled as a matter of law to an award of compensatory damages. Azimi misreads Harris. That decision only speaks to what a plaintiff needs (or does not need) to show to obtain a liability judgment in a Title VII hostile work environment action. See *id.* at 22 ("Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." (citation omitted)). This appeal does not turn on that issue. Indeed, no challenge has been raised here to the jury's liability verdict, and there is no doubt that the jury reasonably found that Jordan's Meats subjected Azimi to an abusive working environment in violation of Title VII, regardless of whether Azimi demonstrated psychological injury. It is a separate question altogether, though, whether having made such a liability finding, the jury was required to award Azimi compensatory damages. There is nothing in Harris to override the ordinary rule that causation of damages must be proven to, and is the province of, the factfinder; if anything, Harris cuts against Azimi's argument, since it holds that a jury is entitled to find liability without necessarily finding psychological injury.

n4 Azimi was hired in November 1999 as a temporary employee and did not become a permanent employee until July 2000.

n5 Defendants suggest that the lack of an award of

nominal damages may be important to the issue of whether Azimi is a prevailing party for an award of attorney's fees. See *Farrar v. Hobby*, 506 U.S. 103, 114, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) (holding that an award of nominal damages makes a plaintiff a "prevailing party" within the meaning of 42 U.S.C. § 1988 and thus makes plaintiff eligible for attorney's fees). This circuit has yet to resolve whether a Title VII and § 1981 plaintiff who wins a liability judgment and a declaratory judgment, but not a damages award, counts as a "prevailing party" within the meaning of 42 U.S.C. § 2000e-5(k) or § 1988. We express no view today on the issue.

n6 Four circuits have recognized the disagreement, but have avoided the issue on other grounds. See *Salitros v. Chrysler Corp.*, 306 F.3d 562, 575 (8th Cir. 2002) (reserving the question whether punitive damages are available in the absence of compensatory and nominal damages, because punitive damages could be predicated on front pay, which had been awarded); *Corti v. Storage Tech. Corp.*, 304 F.3d 336, 341-43 (4th Cir. 2002) (allowing for punitive damages where there was an award of back pay); *E.E.O.C. v. W&O, Inc.*, 213 F.3d 600, 615 & n.5 (11th Cir. 2000); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 515 (9th Cir. 2000).

n7 42 U.S.C. § 1981a(a)(1) provides:

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964[, 42 U.S.C. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its

disparate impact) prohibited under section 703, 704, or 717 of the Act[, 42 U.S.C. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

n8 That is, we would be bound unless there is an intervening and contrary Supreme Court precedent. Azimi presents no argument that this is so.

n9 The Fifth Circuit, in LeBlanc, identified Kerr-Selgas as a § 1981 case. *LeBlanc*, 211 F.3d at 303 ("[I]n another 42 U.S.C. § 1981 case, the First Circuit held that a punitive damages award must be vacated absent either a compensatory damages award or a timely request for nominal damages."). It is clear from the context of the statement, however, that the LeBlanc court meant to identify Kerr-Selgas as a case under § 1981a (which sets out the damages available under Title VII), not § 1981.

n10 Azimi points out that his complaint requested "such further relief as deemed appropriate," and argues that this statement is tantamount to a timely request for nominal damages. There is nothing in this vague prayer for relief, however, that would compel the district court to award nominal damages or that would even give notice to the court that such damages were being sought. Azimi also argues that in his reply to defendant's opposition to his motion for a new trial, he wrote: "[A]t a minimum, the court should award nominal damages in most cases. At the very least, the court should do so in this case." Even if this perfunctory

statement, articulated belatedly in a reply brief rather than in the motion for a new trial, would have been enough to put the court on notice of a nominal damages claim, the nominal damages request was still untimely.

n11 Azimi does not ask for plain error review of the nominal damages issue. Regardless, there was no plain error here.

n12 The magistrate judge's recommended decision, which was adopted by the district court, granted summary judgment on the merits of the unlawful discharge theory under Title VII, § 1981, and the Maine Human Rights Act (MHRA), Me. Rev. Stat. Ann. tit. 5, § 4551 et seq. The recommended decision also held that Azimi had failed to exhaust his Title VII unlawful discharge claim, and Azimi did not challenge this determination before the district court. Thus, technically all that is before us to review are the claims under § 1981 and MHRA for unlawful discharge.

n13 Azimi vaguely suggests that defendant's evidence was not admissible, *Hodgens*, 144 F.3d at 160, because it constituted hearsay evidence. The argument is insufficiently developed, and we thus consider it waived. See *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). In any event, Azimi offers no response to Jordan's Meats' rejoinder that the exhibits were business records, see Fed. R. Evid. 803(6), and that they and the affidavit were submitted to prove not the underlying events but the information Smith had at the time he made his decision to terminate Azimi.

n14 Azimi does not argue that any of his harassers was involved in the decision to terminate him. See *Medina-*

Munoz, 896 F.2d at 10 ("The biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case."). Nor does Azimi allege that this is a case like *Cariglia v. Hertz Equipment Rental Corp.*, 363 F.3d 77 (1st Cir. 2004), in which a neutral decisionmaker is induced to act based on inaccurate information provided because of the provider's discriminatory animus. There is no claim that Manning or Adams were biased against Azimi because of his race, religion, or ethnicity. The record shows that Manning, Adams, and Azimi had a cordial relationship prior to the events of November 7, 2001.

Civil No. 03-268-P-C
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ABDUL W. AZIMI,
Plaintiff

v.

JORDAN'S MEATS, INC.,
Defendant

July 13, 2005, Decided

COUNSEL: For ABDUL W AZIMI, Plaintiff: JOHN R. LEMIEUX, FARRIS, HESELTON, LADD & BOBROWIECKI, P.A., GARDINER, ME; DANIEL W. BATES, FARRIS AND BATES PA, GARDINER, ME.

For JORDANS FOODS INC, JORDANS MEATS INC, Defendants: LAWRENCE C. WINGER, PORTLAND, ME.

JUDGES: Gene Carter, Senior District Judge.

OPINION BY: Gene Carter

OPINION:

ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL ON DAMAGES

Gene Carter, Senior District Judge

Now before the Court is Plaintiff's Motion for a New Trial on Damages made on seven separate grounds (Docket Item No. 86). Specifically, Plaintiff moves for a new trial on the following grounds:

> 1. The jury verdict on damages was based upon a verdict form which was improper as a matter of law and affected the substantial rights of the Plaintiff.
>
> 2. The jury instructions and verdict form violate the clear and controlling law of *Harris v. Forklift Sys., 510 U.S. 17, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993).*
>
> 3. The final verdict form violated the Rules and substantially affected Plaintiff's right to a fair trial.
>
> 4. The jury verdict on damages is against the weight of the evidence.
>
> 5. The admission of Defendant's exhibits prejudiced Plaintiff on the issue of damages [**2] warranting a new trial on damages.
>
> 6. The Court committed plain error in effectively failing to submit the issue of punitive damages to the jury, regardless of the jury's negative response to question numbered 3 on the Special Verdict Form.
>
> 7. The Court erred in taking Plaintiff's claim of discriminatory and retaliatory discharge from the jury.

The Court will address each issue in turn.

With respect to the first two items, Plaintiff argues that question 3 on the Special Verdict Form impermissibly imposed a burden of proof not required by the law. Indeed, Plaintiff seems to argue that question 3 was wholly unnecessary. Question 3 on the Special Verdict Form states:

> Has Plaintiff, Abdul Azimi, proven by a preponderance of evidence that Defendant Jordan's Meats, Inc.'s unlawful harassment legally caused Plaintiff to be damaged by emotional distress, pain, suffering, emotional anguish, loss of enjoyment of life and/or inconvenience?

The Court has reviewed the Special Verdict Form in its entirety and concludes that the causation inquiry in question 3 is necessary in order for the jury to reach question 4 to determine what amount of damages should be awarded to Plaintiff. Causation of damages cannot be assumed by the finding of liability or a violation of the statutory provision. Along these same lines, Plaintiff also complains that the jury instructions and the verdict form violate the law as established in *Harris v. Forklift Sys., 510 U.S. 17, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993).* First, the Court notes that Plaintiff never objected during trial to the instructions on causation and damages. *See* Transcript of April 25, 2005, sidebar conference after jury charged (Docket Item No. 92). Moreover, the Court finds that its instructions on these points are in accordance with the law.

Plaintiff next contends that the final verdict form was not presented to counsel until after the conclusion of closing arguments and, thus, violated *Fed. R. Civ. P. 51(b)(1)* and substantially affected Plaintiff's right to a fair trial. Specifically, Plaintiff contends that after the charge conference the Court inserted the standard of proof "by a preponderance of evidence" in question 3 -- causation of compensatory damages, and question 5 -- entitlement to punitive damages. Assuming the Court did insert the phrase "by a preponderance [**4] of evidence" into these two questions after the charge conference and without discussing this change with counsel, such action does not violate *Rule 51(b)(1)* and certainly did not affect Plaintiff's right to a fair trial. Repetition of the appropriate standard of proof in a question on the Special Verdict Form is not erroneous. Moreover, the Court notes that although Plaintiff made some objections to the charge at sidebar after the Court had instructed the jury, Plaintiff made no objection to anything on the verdict form. *See* Transcript of April 25, 2005 sidebar conference after jury charged (Docket Item No. 92) at 7. Accordingly, the Court concludes that the alleged changes to the Special Verdict Form do not constitute error and certainly do not meet the plain error test articulated in *United States v. Olano, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993).*

The Court has given serious consideration to the next issue raised by Plaintiff-that the jury verdict on damages is against the weight of the evidence. The Court concludes, however, that the jury's conclusion was reasonable in light of all the evidence presented at trial.

Next, Plaintiff argues that the admission of some of Defendant's exhibits prejudiced Plaintiff on the issue of damages. Specifically, Plaintiff points to the admission of exhibits 4, 11, 12, 31, 32, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 57F as supporting his claim for a new trial on damages. The Court has reviewed these exhibits as well as its trial notes relating to the objections made to their admission and concludes that each was properly admitted for the reasons stated on the record at trial. In addition, the Court notes that with respect some of the exhibits now claimed to be unfairly prejudicial, Plaintiff either did not object to the admission at trial (exhibit 31), the exhibit was never admitted (exhibit 32), or Plaintiff himself moved for the exhibit's admission (exhibit 36).

Plaintiff also contends that the Court committed plain error by failing to submit the issue of punitive damages to the jury. The direction on the Special Verdict Form following question 3 states: "If you answered Question 3 'YES,' then answer Question 4. If you answered Question 3 'NO,' then answer no further questions." The punitive damages question should have been able to be reached by the jury, Plaintiff argues, despite the negative answer to question 3 on the Special Verdict Form.

The jury awarded Plaintiff no compensatory damages and Plaintiff never requested that the jury be instructed on the issue of nominal damages. Moreover, Plaintiff has never requested an award of nominal damages based on the jury's liability verdict. Absent such a timely request, the Court will not now order an award of nominal damages. *See Kerr-Selgas v. American Airlines, Inc., 69 F.3d 1205, 1215.* The law of the First Circuit is that in a Title VII and in a *§ 1981*

case, punitive damages cannot be awarded in the absence of compensatory or nominal damages. *Id. at 1214-15*; *Rodriguez-Torres v. Caribbean Forms Manuf., Inc., 399 F.3d 52, 65 n.12 (1st Cir. 2005)*(citing *Kerr-Selgas); see also Provencher v. CVS Pharmacy, 145 F.3d 5 (1st Cir. 1998)*(distinguishing *Kerr-Selgas* based on critical fact of the award of back pay and affirming jury award of punitive damages in light of court's back pay award). Therefore, the directions following question 3 on the Special Verdict Form are correct.

Finally, Plaintiff contends that the Court erred in taking his claims of discriminatory and retaliatory discharge out of the case on summary judgment. The argument on this point repeats Plaintiff's unsuccessful opposition to Defendant's Motion for Summary Judgment. It is, therefore, not a proper basis for a new trial on damages.

Accordingly, for the reasons discussed above, the Court ORDERS that Plaintiff's Motion for a New Trial on Damages be, and it is hereby, DENIED.

Gene Carter

District Judge

Dated at Portland, Maine this 13th day of July, 2005.

Civil No. 03-268-P-C
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ABDUL W. AZIMI,
Plaintiff

v.

JORDAN'S MEATS, INC.,
Defendant

July 13, 2005, Decided

COUNSEL: For ABDUL W AZIMI, Plaintiff: JOHN R. LEMIEUX, FARRIS, HESELTON, LADD & BOBROWIECKI, P.A., GARDINER, ME; DANIEL W. BATES, FARRIS AND BATES PA, GARDINER, ME.

For JORDANS FOODS INC, JORDANS MEATS INC, Defendants: LAWRENCE C. WINGER, PORTLAND, ME.

JUDGES: Gene Carter, Senior District Judge.

OPINION BY: Gene Carter

OPINION:

ORDER ADOPTING AND AFFIRMING THE MAGISTRATE JUDGE'S RECOMMENDED DECISION

Now before the Court is Plaintiff's Objection to the Recommended Decision of the Magistrate Judge

(Docket Item No. 24). Pursuant to *28 U.S.C. § 636(b)(1)(C)*, this Court has conducted a de novo review of the Magistrate Judge's Recommended Decision herein (Docket Item No. 23) together with the entire record on the Motion and of the Plaintiff's Objections and the Defendant's Response to Plaintiff's Objection (Docket Item No. 25) and has heard the oral arguments of counsel. The Court CONCLUDES that there is no genuine issue of material fact generated by the record made on the Motion as to whether the Defendant's decision to terminate the Plaintiff's employment was caused by any discriminatory animus arising from the prior course of Plaintiff's treatment in the work place.

Accordingly, the Court ADOPTS and AFFIRMS the Recommended Decision and it is hereby ORDERED that the Defendant's Motion for Summary Judgment be, and it is hereby, GRANTED as to Counts I and II to the extent that they encompass any claim of discrimination by reason of unlawful termination of the Plaintiff from his employment and as to Count III in its entirety, and is otherwise DENIED.

Gene Carter

Senior District Court Judge

Dated at Portland, Maine this 23rd day of November, 2004.

U.S. District Court District of Maine

The following transaction was received from CARTER, GENE entered on 9/20/2005 at 10:33 AM EST and filed on 9/20/200

Case Name: AZIMI v. JORDANS MEATS INC

Case Number: 2:03-cv-268

Document Number: 106

Docket Text:

ORDER denying [99],Motion for Reconsideration. The said Motion is hereby DENIED, after full consideration of the written submissions thereon, the Court FINDING that the issues generated were waived at trial or are otherwise without merit for reasons fully explored at trial. So ORDERED. By Judge GENE CARTER. (CARTER, GENE)

Civil No. 03-268-P-C
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ABDUL W. AZIMI,
Plaintiff

v.

JORDAN'S MEATS, INC.,
Defendant

[Discrimination Based on Race, Religion, or Ethnic Origin]

SPECIAL VERDICT FORM

1. Has Plaintiff., Abdul Azimi, proven by a preponderance of evidence that he was subjected to an offensive work environment that was hostile to his race, religion or ethnic origin?

Yes X No

[If you answered Question 1 "YES," go on to Question 2. If you answered Question 1 "NO," then answer no further questions.]

2. Has Plaintiff, Abdul Azimi, proven by a preponderance of evidence that Defendant, Jordan Meats, Inc., knew or should have known of the offensive hostile work environment and failed to take adequate and effective remedial measures?

Yes X No

[If you answered Question 2 "YES," go on to Question 3. If you answered Question 2 "NO," then answer no further questions.]

Has Plaintiff, Abdul Azimi, proven by a preponderance of evidence that Defendant Jordan's Meats, Inc.'s unlawful harassment legally caused Plaintiff to be damaged by emotional distress, pain, suffering, emotional anguish, loss of enjoyment of life and/or inconvenience?

Yes No X

[If you answered Question 3 "YES," then answer Question 4. If you answered Question 3 "NO," then answer no further questions.]

What amount is Plaintiff entitled to recover from Defendant as compensation for those damages found in answer to Question 3?

[Write out in words] [Figures] [Answer Question 5.]

5. Has Plaintiff, Abdul Azimi, proven by a preponderance of evidence that Defendant's supervisory or managerial personnel acted with malice or with reckless indifference to Plaintiff's federally protected right to be free from unlawful discrimination?

Yes No

[If you answered Question 5 "YES," then answer Question 6. If you answered Question 5 "N0," then answer no further questions.]

6. What amount of punitive damages should be awarded to Plaintiff?

[Write out in words] [Figures]

Foreperson

Dated at Portland, Maine this day of April, 2005.

Civil No. 03-268-P-C
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ABDUL W. AZIMI,
Plaintiff

v.

JORDAN'S MEATS, INC.,
Defendant

JUDGMENT

In accordance with the Order Adopting and Affirming the Magistrate Judge's Recommended Decision dated November 23, 2004, judgment is hereby entered in favor of the Defendant, Jordan's Meats Inc., and against Plaintiff Abdul W. Azimi, on Counts I and 11 of the Complaint to the extent that they encompass any claim of discrimination by reason of unlawful termination of-the. Plaintiff from his employment.

In accordance with the Order Adopting and Affirming the Magistrate Judge's Recommended Decision dated November 23, 2004 judgment is hereby entered and in favor of Defendant, Jordan's Meats, Inc., and against the Plaintiff, Abdul W. Azimi on Count III of the Complaint.

This action came for trial before the Court and a jury, Honorable Gene Carter, District , Court Judge, presiding the Court having granted the Defendant's oral motion for judgment as a matter of law with respect to the retaliation, claims contained in Counts I

and 11 of the Complaint, judgment is hereby entered for the Defendant, Jordan's Meats Inc., and against the Plaintiff, Abdul W. Azimi. The issues having been duly tried and the jury having rendered its verdict, judgment is hereby entered for the Plaintiff, Abdul W. Azimi and against the Defendant; Jordan's Meats, Inc. on the hostile work environment claims asserted in Counts I and lI of the Complaint.

Dated this 29th day of April, 2005.

Civil No. 03-268-P-C
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ABDUL W. AZIMI,
Plaintiff

v.

JORDAN'S MEATS, INC.,
Defendant

AMENDED JUDGMENT

In accordance with the Order Adopting and Affirming the Magistrate Judge's Recommended Decision dated November 23; 2004; judgment is hereby entered in favor of the Defendant, Jordan's Meats Inc., and against Plaintiff Abdul W. Azimi, on Counts I and 11 of the Complaint to the extent that they encompass any claim of discrimination by reason of unlawful termination of the Plaintiff from his employment.

In accordance with the Order Adopting and Affirming the Magistrate Judge's Recommended Decision dated November 23, 2004 judgment is hereby entered and in ,favor of Defendant, Jordan's Meats, Inc., and against the Plaintiff, Abdul W. Azimi on Count Ill of the Complaint.

This action came for trial before the. Court and a jury, Honorable. Gene Carter, District judge, presiding the Court having granted the Defendant's oral Motion for judgment as a matter of law with respect to the retaliation claims contained in Counts I and 11 of the

Complaint, judgment is hereby entered for the Defendant, Jordan's Meats Inc.; and against the Plaintiff, Abdul W. Azimi. The issues having been duly tried and the jury having rendered its verdict, judgment is hereby entered for the Defendant, Jordan's Meat Inc. and against the Plaintiff, Abdul W. Azimi on the hostile work environment claims asserted in Counts I and 11 of the Complaint.

Dated this 29th day of April, 2005.

Civil No. 03-268-P-C
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ABDUL W. AZIMI,
Plaintiff

v.

JORDAN'S MEATS, INC.,
Defendant

SECOND AMENDED JUDGMENT

In accordance with the Order Adopting and Affirming the Magistrate Judge's Recommended Decision dated November 23, 2004, judgment is hereby entered in favor of the Defendant, Jordan's Meats, Inc., and against Plaintiff Abdul W. Azimi, on Counts I and 11 of the Complaint to the extent that they encompass any claim of discrimination by reason of unlawful termination of the Plaintiff from his employment.

In accordance with the Order Adopting and Affirming the Magistrate Judge's Recommended Decision dated November 23, 2004 judgment is hereby entered in favor of Defendant, Jordan's Meats, Inc., and against the Plaintiff, Abdul W. Azimi on Count III of the Complaint.

This action came for trial before the Court and a jury, Honorable Gene Carter, District Judge presiding, the Court having granted the Defendant's oral motion for judgment as a matter of law with respect to the retaliation claims contained in Counts I and 11 of the

Complaint, judgment is hereby entered for the Defendant, Jordan's Meats, Inc., and against the Plaintiff, Abdul W. Azimi thereon.

Plaintiff now having moved for declaratory relief and the Court having granted in part the Plaintiff's Motion to Amend the Judgment on this date, judgment is hereby entered for the Plaintiff, Abdul W. Azimi and against Defendant, Jordan's Meats, Inc. on Plaintiff's request for declaratory relief on the hostile work environment claims asserted in Counts I and 11 of the Complaint Therefore, the Court hereby DECLARES that the Defendant Jordan's Meats, Inc. has violated 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981. In accordance with the jury's verdict judgment is entered in favor of Defendant Jordan's Meats, Inc. on Plaintiff's claims for compensatory and exemplary damages.

Dated this 13th day of July, 2005.

No. 05-2602

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ABDUL AZIMI,
Plaintiff, Appellant,

v.

JORDAN'S MEATS, INC.,
Defendant, Appellee.

Before Boudin, Chief Judge, Torruella, Selya, Lynch, and Howard, Circuit Judges, and Stafford, Senior District Judge.

ORDER OF COURT

Entered: August 29, 2006

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

United States Constitution, Amendment XIII: Abolition of Slavery

Neither slavery nor involuntary servitude....shall exist within the United States...Congress shall have power to enforce this article by appropriate legislation.

28 U.S.C. Section 1331: Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States...

42 U.S.C. § 2000e-2 (Title VII): Unlawful employment practices

It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin...

42 U.S.C. §1981: Equal rights under the laws

(a) Statement of equal rights
(b) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the Security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes,

licenses, and exactions of every kind, and to no other.

42 U.S.C. §1981a: Right of Recovery

In an action brought by a complaining party ... against a respondent who engaged in unlawful intentional discrimination ... prohibited under ... 42 U.S.C. 2000e-2 ... and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in sub-section (b) of this section, ... from the respondent.

42 U.S.C. § 1981a(b): Compensatory and Punitive Damages

A complaining party may recover punitive damages under this section against a respondent ... if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to federally protected rights of an aggrieved individual.

F.R.Civ.P. 56(c): Motion for Summary Judgment

shall be rendered...[i]f there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.